Dato' Ariff Wan Hamzah & Ors v HwangDBS Investment Bank Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22–640 OF 2009
NALLINI PATHMANATHAN J
27 NOVEMBER 2012

Tort — Negligence — Negligent misrepresentations and misstatements — Investment of shares on representations based on representations and statements — Loss of earnings and interest — Whether representations faulty, inaccurate and misleading — Whether there was deliberate omission of salient financial information — Duty of care owing — Losses and damages — Whether proven — Whether there was cause of action

The plaintiffs claimed against the defendants for negligent misrepresentation as well as negligent misstatement. The second plaintiff, Wan Hamimie bt Wan Ariff ('Hamimie'), was the daughter of the first plaintiff while the third and fourth plaintiffs, Dr Syed Ibrahim ('Ibrahim') and Mokhtar Ahmad ('Mokhtar') were business associates or partners of the first plaintiff. The plaintiffs claimed a sum of RM6,909,940 together with loss of earnings and interest which they claimed to have lost as a result of investing in the purchase of placement shares in a company called Litespeed Education Technologies Bhd ('Litespeed'), based on the misrepresentations of the two defendants. It was alleged that the defendants' representations were false, inaccurate and misleading and that they suffered losses and damages as the value of the Litespeed shares plunged soon after Hamimie, Ibrahim and Mokhtar purchased the shares allotted to them under the placement exercise. Further or alternatively, the plaintiffs contended that the defendants each owed them separate duties of care. The first defendant, an agent of Litespeed responsible for statements in the Prospectus, owed a duty to investors such as the plaintiffs, to ensure that all information in the Prospectus was accurate up until the date of their subscription of shares in Litespeed, which the first defendant failed to do. The plaintiffs' claim against the second defendant, who was Litespeed's auditor and reporting accountant, premised on tort of negligent misstatement on the ground that its statements for the relevant financial years as well as the prospective forecast in the Prospectus were reported favourably when they were actually inaccurate, false and misleading. A duty of care was owed, it was contended, to these plaintiffs to ensure that the financial statements set out in the Prospectus were accurate and fair, which the second defendant had breached. In opposing the plaintiffs' claims, the defendants maintained, inter alia, that they made no misleading statements or false representations as alleged; they owed no duty to the purchasing plaintiffs as contended and

therefore cannot be responsible for any losses suffered by the purchasing plaintiffs; and that they had cautioned all investors in the Prospectus that there were no guarantees concerning Litespeed's share prices and investors were advised to be careful about the inherent risks of such an investment. The second defendant argued that the plaintiffs were not entitled to rely on any of the statements made by it in the Prospectus and therefore owed no duty of care to the plaintiffs.

Held, dismissing the claim with costs:

(1) The plaintiff's cause of action which premised on negligent misrepresentation by the first defendant failed. The plaintiffs were bound to act on their own initiative and with the requisite professional advice independently obtained in determining whether or not to invest in the Litespeed placement shares. The limitation or exclusion clause was worded specifically to meet a situation such as has arisen here, namely ascribing blame or liability to the first defendant for the investors' decision to invest in the Litespeed shares. This was not a general exclusion or widely worded limitation of liability clause. Such clauses cannot simply be ignored. By executing the letters of offer, the plaintiffs accepted these clauses as part of the binding contract for the purchase of the placement shares and the effect of these clauses ought to be given full effect. The net effect of these clauses was to exempt or exclude the first defendant from liability (see para 74).

(2) The first defendant did not omit or deliberately withhold salient financial information as alleged by the plaintiffs. Given their lack of knowledge at the material time it cannot be said that there was any negligent misstatement on their part. As there was no further duty on their part to investigate and verify financial performance beyond, it could not be concluded that they breached a duty of care. The first defendant had no duty of care to ascertain and verify the financial performance for the first and second quarters of 2005–2006 and report on the same as was alleged by the plaintiff. As they owed no such duty of care to prospective purchasers including the plaintiffs, there could be no liability under this head against the first defendant (see para 92).

(3) The plaintiffs, particularly the second to fourth plaintiffs did not rely in a specific way upon any of the information set out in the Prospectus. A general reliance was insufficient. The plaintiffs were bound to show that the information issued by the accountants worked so as to exert a specific influence on their minds and as a consequence of which they were induced to purchase the shares. That has not been made out in the instant case which is another reason why the plaintiffs' claim against the second defendant in this regard fails (see para 105).

(4) It was evident that the plaintiffs' complaint was that the assumptions

pertaining to the financial forecast were wholly unrealistic, and as a consequence, misleading to prospective purchasers such as the plaintiffs, when risks of non-performance of various contracts, or assumptions made on contingent bases, were not highlighted. No proper qualifications were made or highlighted. No attempt was made to verify the matters set out in the assumptions (see para 107).

(5) The first defendant played a lesser role in relation to the profit forecast for 2006 than the reporting accountants and was absolved of any issues of negligent misstatement or misrepresentation or omission. As stated before and borne out by the verification notes the scope of the first defendant's duty was to verify the issue price, details of the public issue, brokerage, underwriting and placement fees, restructuring and listing exercise, and the procedure for application and acceptance (see paras 143–144).

(6) The plaintiffs were not entitled to any losses or damages as claimed as they have not established their case against the defendant. The plaintiffs failed to establish that the second to fourth plaintiffs actually suffered such losses as it was not evident in the first place that they had paid for those shares. It was also not clear on the evidence, apart from a bare statement to that effect that the first plaintiff paid for the shares (see para 191(a) & (c)).

[Bahasa Malaysia summary

Plaintif menuntut daripada defendan bagi kecuaian salah tafsiran serta salah nyata cuai. Plaintif kedua, Wan Hamimie bt Wan Ariff ('Hamimie'), adalah anak perempuan plaintif pertama manakala plaintif ketiga dan keempat, Dr Syed Ibrahim ('Ibrahim') dan Mokhtar Ahmad ('Mokhtar') adalah rakan perniagaan atau rakan kongsi plaintif pertama. Plaintif-plaintif menuntut sejumlah RM6,909,940 bersama-sama dengan kehilangan pendapatan dan faedah yang didakwa hilang akibat melabur dalam pembelian penempatan saham di sebuah syarikat yang dipanggil Jasa Kita Education Technologies Bhd ('Jasa Kita'), berdasarkan salah nyata kedua-dua defendan. Adalah didakwa bahawa representasi defendan adalah palsu, tidak tepat dan mengelirukan dan bahawa mereka mengalami kerugian dan kerosakan kerana nilai saham Jasa Kita menjunam sejurus selepas Hamimie, Ibrahim dan Mokhtar membeli saham yang diperuntukkan kepada mereka di bawah pelaksanaan penempatan. Selanjutnya atau sebagai alternatif, plaintif-plaintif menghujahkan bahawa kesemua defendan mempunyai tugas berhati-hati yang berasingan. Defendan pertama, ejen Jasa Kita bertanggungjawab bagi penyata dalam Prospektus, berkewajipan kepada pelabur seperti plaintif-plaintif, untuk memastikan bahawa semua maklumat dalam Prospektus adalah tepat sehingga tarikh langganan saham mereka di Jasa Kita, yang mana defendan pertama gagal untuk penuhi. Plaintif-plaintif menuntut daripada defendan kedua, yang merupakan juruaudit Jasa Kita ini dan akauntan, berlandaskan pada tort salah

nyata cuai atas alasan bahawa penyata yang bagi tahun-tahun kewangan berkaitan serta ramalan bakal dalam Prospektus telah mendapat laporan baik sedangkan ia adalah sebenarnya tidak tepat, palsu dan mengelirukan. Kewajipan berjaga-jaga yang terhutang, ditegaskan, kepada plaintif-plaintif untuk memastikan bahawa penyata kewangan yang dibentangkan dalam Prospektus adalah tepat dan adil, yang mana telah dilanggar oleh defendan kedua. Dalam menentang tuntutan plaintif-plaintif, defendan mengekalkan, antara lain, bahawa mereka tidak membuat sebarang pernyataan mengelirukan atau representasi palsu seperti yang didakwa; mereka tidak mempunyai tanggungjawab kepada plaintif-plaintif yang membeli seperti yang dihujahkan dan oleh itu tidak boleh dipertanggungjawabkan bagi apa-apa kerugian yang dialami oleh plaintif-plaintif yang membeli; dan bahawa mereka telah memberi peringatan kepada semua pelabur dalam Prospektus bahawa tiada jaminan harga saham dan pelabur-pelabur Jasa Kita telah dinasihatkan supaya berhati-hati mengenai risiko yang wujud dalam pelaburan sedemikian. Defendan kedua menghujahkan bahawa plaintif-plaintif tidak berhak untuk bergantung pada mana-mana kenyataan yang dibuat olehnya dalam Prospektus dan dengan itu tidak menanggung kewajipan berjaga-jaga kepada plaintif-plaintif.

Diputuskan, menolak tuntutan dengan kos:

(1) Kausa tindakan plaintif-plaintif tindakan berdasarkan salah tafsiran kecuaian oleh defendan pertama gagal. Plaintif-plaintif telah terikat untuk bertindak atas inisiatif sendiri dan dengan nasihat profesional yang diperlukan, diperolehi secara bebas dalam menentukan sama ada atau tidak untuk melabur dalam penempatan saham Jasa Kita. Had atau klausa pengecualian disusun khusus untuk memenuhi situasi seperti telah timbul di sini, iaitu meletakkan anggapan salah atau liabiliti kepada defendan pertama bagi keputusan pelabur untuk melabur dalam saham Jasa Kita. Ini bukan satu pengecualian umum atau had fasal liabiliti yang disusun secara meluas. Fasal tersebut tidak boleh hanya diabaikan. Dengan melaksanakan surat tawaran, plaintif-plaintif telah menerima fasal ini sebagai sebahagian daripada kontrak mengikat bagi pembelian saham penempatan dan akibat fasal ini patut diberi kesan sepenuhnya. Kesan keseluruhan fasal ini adalah untuk mengecualikan atau tidak defendan pertama daripada liabiliti (lihat perenggan 74).

(2) Defendan pertama tidak melakukan peninggalan atau sengaja menyimpan maklumat kewangan yang penting seperti yang didakwa oleh plaintif-plaintif. Memandangkan kekurangan pengetahuan mereka pada masa material, ia tidak boleh dikatakan bahawa terdapat sebarang salah nyata kecuaian di pihak mereka. Kerana tiada kewajipan lanjut di pihak mereka untuk menyiasat dan mengesahkan melampaui prestasi kewangan, ia tidak boleh membuat kesimpulan bahawa mereka melanggar kewajipan berjaga-jaga. Defendan pertama tidak mempunyai

kewajipan berjaga-jaga untuk memastikan dan mengesahkan prestasi kewangan bagi suku pertama dan kedua 2005–2006 dan melaporkannya seperti yang didakwa oleh plaintif-plaintif. Memandangkan mereka tidak mempunyai tanggungan berhati-hati kepada bakal pembeli termasuk plaintif-plaintif, tidak mungkin terdapat liabiliti di bawah tajuk ini terhadap defendan pertama (lihat perenggan 92).

(3) Plaintif-plaintif, khususnya plaintif kedua hingga plaintif keempat tidak bergantung dengan cara yang tertentu atas apa-apa maklumat yang dinyatakan dalam Prospektus. Satu pergantungan umum adalah tidak mencukupi. Plaintif-plaintif telah terikat untuk menunjukkan bahawa maklumat yang dikeluarkan oleh akauntan berfungsi untuk mengenakan pengaruh tertentu pada fikiran mereka dan akibatnya, mereka telah terdorong untuk membeli saham. Ini tidak dibuat dalam kes ini yang merupakan satu lagi sebab mengapa tuntutan plaintif-plaintif terhadap defendan kedua dalam hal ini gagal (lihat perenggan 105).

(4) Adalah jelas bahawa aduan plaintif-plaintif adalah bahawa andaian yang berkaitan dengan ramalan kewangan sama sekali tidak realistik, dan akibatnya, mengelirukan bakal pembeli seperti plaintif-plaintif, apabila risiko ketidaklaksanaan pelbagai kontrak, atau andaian yang dibuat di luar jangka asas, tidak diketengahkan. Tiada kelayakan yang betul telah dibuat atau diketengahkan. Tiada usaha dibuat untuk mengesahkan perkara yang dinyatakan dalam andaian (lihat perenggan 107).

(5) Defendan pertama memainkan peranan yang kurang penting berhubung unjuran keuntungan bagi tahun 2006 daripada akauntan dan bebas daripada apa-apa isu-isu salah nyataan cuai atau salah nyataan atau peninggalan. Seperti yang dinyatakan sebelum ini dan yang ditanggung oleh pengesahan nota skop kewajipan defendan pertama adalah untuk mengesahkan harga terbitan, butir-butir terbitan awam, yuran brokeraj, pengunderailan dan penempatan, penyusunan semula dan penyenaraian latihan dan prosedur bagi permohonan dan penerimaan (lihat perenggan 143–144).

(6) Plaintif-plaintif tidak berhak kepada apa-apa kerugian atau kerosakan seperti yang didakwa kerana mereka tidak berjaya membuktikan kes mereka terhadap defendan. Plaintif-plaintif telah gagal untuk membuktikan bahawa plaintif kedua hingga keempat sebenarnya mengalami kerugian tersebut kerana ia tidak jelas dari awal lagi bahawa mereka telah membayar syer-syer tersebut. Ia juga tidak jelas pada keterangan, selain daripada kenyataan kosong bahawa plaintif pertama membayar bagi saham-saham tersebut (lihat perenggan 191(a) & (c)).]

Cases referred to

Amal Bakti Sdn Bhd & Ors v Affin Merchant Bank (M) Bhd [2012] 5 MLJ 61, CA (distd)

A *Boyd Knight v Purdue* [1999] 2 NZLR 279, CA (refd)
Canavan v Wright [1957] NZLR 790, CA (refd)
Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)
Electra Private Equity Partners v KPMG Peat Marwick and others [2001] 1 BCLC 589, CA (refd)
B *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, HL (refd)
James McNaughton Paper Group Ltd v Hicks Anderson & Co [1991] 2 WLR 641, CA (refd)
Malaysian International Merchant Bankers Bhd v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia [2001] 1 MLJ 375, CA (distd)
C *Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors* [2008] 2 MLJ 256, CA (refd)
Orient Centre Investments and another v Societe Generale [2007] 3 SLR 566, CA (refd)
Peekay Intermark Ltd & Anor v Australia and New Zealand Banking Group Ltd
D [2006] 2 Lloyd's Rep 511, CA (refd)
Scott Group v McFarlane [1978] 1 NZLR 553, CA (refd)
White v Jones [1995] 2 AC 207, HL (refd)

TS Lim (James Khong with him) (James Khong) for the plaintiff.
E *Yoong Sin Min (Samuel Tan with him) (Shook Lin & Bok) for the first defendant.*
Kelvin Seet (Vendee Chai with him) (Cheang & Ariff) for the second defendant.

Nallini Pathmanathan J:

F

INTRODUCTION

[1] The plaintiffs' claim against the defendants here is premised on negligent
G misrepresentation as well as negligent misstatement.

[2] The plaintiffs are individuals who are related in the following manner. The second plaintiff, Wan Hamimie bt Wan Ariff ('Hamimie'), is the daughter of Dato' Ariff Wan Hamzah, the first plaintiff ('Dato' Ariff'). The third and
H fourth plaintiffs, Dr Syed Ibrahim ('Ibrahim') and Mokhtar Ahmad ('Mokhtar') are Dato' Ariff's business associates or partners.

[3] The plaintiffs claim a sum of RM6,909,940 together with loss of earnings and interest which they claim to have lost as a consequence of
I investing in the purchase of placement shares in a company called Litespeed Education Technologies Bhd ('Litespeed') now known as Eduspec Holdings Bhd. In essence the plaintiffs contend that they were induced to enter into the said purchases of shares in Litespeed based on the misrepresentations of the two defendants. They contend that they relied on the representations of both

defendants, which representations subsequently proved to be false, inaccurate and misleading. As a consequence they maintain that they have suffered loss and damage as the value of the Litespeed shares plunged soon after Hamimie, Ibrahim and Mokhtar purchased the shares allotted to them under the placement exercise.

[4] Further or alternatively the plaintiffs contend that the defendants each owed them separate duties of care. The first defendant, as Litespeed's advisor, managing underwriter, sponsor and placement agent was responsible for statements in the prospectus, and owed a duty to investors such as the plaintiffs, to ensure that all information contained in the prospectus was accurate up until the date of their subscription of shares in Litespeed. It is further contended that the first defendant was under statutory duty to issue a supplementary prospectus in the event there was a significant changein any matter disclosed in the prospectus, or if there was a material misstatement or misleading statement or material omission. In breach of such duty, it is contended the first defendant failed to ensure that the material information in the prospectus was accurate and reliable and additionally failed to update or ensure that the information in the prospectus was up to date until the date of subscription of the shares by the plaintiffs.

[5] With respect to the second defendant who were Litespeed's auditors and reporting accountants, the plaintiffs' grievance stems from its statements for the relevant financial years as well as the prospective forecast which were, in the prospectus, reported favourably. In reliance on the stated financial figures the plaintiffs maintain that the representation in the prospectus was that Litespeed was financially sound. Again, subsequent to the subscription, Hamimie, Ibrahim and Mokhtar complain that those financial statements were inaccurate, false and misleading. Their claim against the second defendant is premised in tort for negligent misstatement.

[6] A duty of care was owed, it was contended, to these plaintiffs to ensure that the financial statements set out in the rospectus were accurate and fair, which duty the second defendant failed to comply with or abide by.

[7] The defendants vigorously dispute the foregoing maintaining, inter alia, that:

(a) they made no misleading statements or false representations as alleged;

(b) they owed no duty to the purchasing plaintiffs as contended and therefore cannot be responsible for any losses suffered by the purchasing plaintiffs;

(c) they cautioned all investors in the prospectus that there were no

guarantees concerning Litespeed's share prices and investors were advised to be careful about the inherent risks of such an investment; and

(d) the second defendant maintains that the plaintiffs were not entitled to rely on any of the statements made by it in the reporting accountants' report contained in the prospectus and therefore owed no duty of care to the plaintiffs.

THE FACTUAL BACKGROUND

[8] The background facts are set out comprehensively in the submissions of all the parties as well as the evidence adduced during the course of trial. I adopt in part some of the submissions of learned counsel for the parties below:

> Between 2003–2005, D1 was known as Hwang-DBS Securities Bhd and was a stockbroking company as well as a universal broker. It could, and did, act as advisor in corporate matters at the time. Subsequently it was licensed as an investment bank in January 2007.

[9] In or around 2005, Litespeed was approved by the Securities Commission for public listing on the Malaysian Exchange of Securities Dealing and Automated Quotation ('MESDAQ'). MESDAQ which has now been replaced by the ACE Market, was then a market where public quoted shares of technology based companies with scant financial track records were listed and traded.

[10] Litespeed was incorporated by Litespeed Education Pte Ltd, a Singapore company that decided to incorporate it and list it on MESDAQ. Litespeed is a company that, as it name suggests, is involved in propogataing education and learning technology.

[11] HwangDBS Investment Bank Bhd ('D1') was appointed by Litespeed to assist with its prospective listing as well as to be it's placement agent for a portion of Litespeed's shares to be subscribed to by propsective shareholders.

[12] On 20 July 2005 Bursa Malaysia gave its approval to Litespeed for the proposed listing on MESDAQ.

[13] D1 assisted Litespeed in preparing Litespeed's prospectus dated 27 October 2005 ('the prospectus') for its shares issue in conjunction with the

listing of 32,500,000 new ordinary shares at an issue price of 47 sen per share. The shares comprised:

(a) 4,234,000 shares available to directors, employees and business associates of Litespeed;

(b) 5,000,000 shares available for the Malaysian public; and

(c) 23,257,000 shares available by way of private placement ('placement shares').

[14] D1 also assisted Litespeed to procure investors for the placement shares. To this end, one of D1's officers by the name of Ms Ong Hui Hui, DW3 ('Ms Ong') contacted one Encik Nik Haniff Kamal sometime in 2005 on behalf of Litespeed, seeking to have Litespeed's officers make a presentation to potential investors for the MESDAQ listing. This was part of the exercise to secure investors for the placement shares. At that time Ms Ong was a director of corporate finance in D1.

[15] The plaintiffs maintain that Ms Ong, by reason of several prior transactions involving Dato' Ariff and companies he is connected to, acted in the capacity of an advisor at all times. Dato' Ariff further testified in the course of his testimony that Ms Ong made several specific and express representations pertaining to the advantages of purchasing Litespeed shares by way of a private placement. These representations included references, according to him, of the financial performance of Litespeed, its profit forecast and its price.

[16] Ms Ong on the other hand, strongly denies making any such representations to Dato' Ariff, maintaining in turn that all representations pertaining to Litespeed were made by a director of Litespeed during the course of the one presentation that was made to Dato' Ariff as a prospective purchaser. Ms Ong further disputes that she exerted any influence whatsoever on Dato' Ariff or any of the other plaintiffs. She denies that she made any of the several representations in respect of Litespeed, that she is now alleged to have made.

[17] It is not however in dispute that Ms Ong together with Litespeed's director at that time, one Pok Vik Sent and other officers of Litespeed met with Nik Haniff Kamal who in turn arranged for Ms Ong and the Litespeed team of officers to meet up with Dato' Ariff.

[18] A presentation was duly made by D1 on 3 October 2005. The plaintiffs, in their statement of claim, alleged that Dato' Ariff had several meetings with Ms Ong where she had made representations and presentations in respect of the Litespeed shares. At trial however, Dato'Ariff could only recall one meeting with Ms Ong and the Litespeed officers on 3 October 2005.

A THE MEETING DATED 3 OCTOBER 2005

[19] Ms Ong herself maintained that the Litespeed directors had made one if not two presentations to Dato' Ariff. Ms Ong was clear that the entire presentation was made by the Litespeed directors and not herself. All queries with regards to the company were also directed to the Litespeed director and his team. She maintained that she did not make any representations. This issue of fact is, naturally, in dispute.

[20] Hamimie Ariff, the second plaintiff was present for part of the meeting.

[21] The plaintiffs, through Dato' Ariff maintain that at the meeting with Ms Ong on 3 October 2005, she personally briefed Dato' Ariff and Hamimie that Litespeed was a good prospect for investment; that it was financially sound and that there was little, if any risk in the investment; that Litespeed had earned a profit after tax of RM6,291,000 for the financial year ending 30 April 2005; that it was expected to earn a profit after tax of not less than RM7.5m during its first year of listing thereby yielding an average earning per share of not less than RM0.07 per share. According to Dato' Ariff, he understood from Ms Ong that the shares of Litespeed would appreciate in value. As such it was put to the prospective investors that the issue price of RM0.47 per share was fair and reasonable.

[22] Dato' Ariff's testimony is diametrically opposed to that of Ms Ong herself who testified on behalf D1. In the course of her testimony Ms Ong testified that she was present on behalf of D1 to field questions on the listing. She reiterated that she made no representations of any kind that Litespeed would be a good investment. Neither was its profitability guaranteed, according to her. She further stated that all details of the business and future plans of Litespeed were dealt with by the director of Litespeed. She stated that she was fully aware that as a company listed on MESDAQ, which listed small capital tech companies with a limited or no financial track record, she was not in a position to over sell or make any representations to the effect that potential investors would be guaranteed or assured of profits. She further testified that Dato' Ariff, as a 'savvy businessman' would be well aware of the inherent risks involved in investing in MESDAQ companies.

[23] Ms Ong remained consistent in her testimony. In the course of cross-examination, she explained that at roadshows and presentations it was not the function of D1 to explain the investment prospects of the IPO and soon to be listed companies, because this task was always undertaken by the directors and officers of the company. D1 would not, she insisted, make any recommendations at all but would leave this to the company.

THE INFORMATION MEMORANDUM DATED 12 AUGUST 2005

[24] It is not in dispute that at the meeting on 3 October 2005, Ms Ong provided Dato' Ariff with an information memorandum dated 12 August 2005. This is because the prospectus had not been completed. The prospectus was only made available on 27 October 2005.

[25] The information memorandum gives information about the soon to be listed company, Litespeed. A perusal of the same discloses the following salient points:

The recipient agrees and undertakes to be bound by the following terms and conditions, inter alia:

(a) D1 made no recommendation to the recipient to undertake the proposed investment;

(b) D1 did not assume any obligation to provide any recipient with any additional information or to update or revise any information should it prove to be incorrect or misleading;

(c) the recipient was to be solely responsible for his investment decision and was advised to seek independent financial, legal or other such professional advice when making its own independent assessment of, amongst others, the financial position, credit-worthiness and prospects of Litespeed and the extent of the risk involved;

(d) D1 and its representatives make no representation or warranty, express or implied as to the adequacy, accuracy or completeness of the information contained in the information memorandum and expressly disclaims any liability (whether in contract or tort) for any information in the said document; and

(e) the Information may contain statements of anticipated future performance of Litespeed which reflect assumptions made by Litespeed and D1. In this respect Litespeed makes no representation or warrant as to the accuracy of the achievement of such statements.

[26] Dato' Ariff admitted that this information memorandum was given to him at the time of the presentation.

[27] It is also not disputed that Dato' Ariff did not subscribe for any of Litespeed's shares. Neither was the identity of the prospective purchasers, namely Hamimie, Ibrahim and Mokhtar, made known to D1 by Dato' Ariff. In other words, none of the prospective purchasers, save for Hamimie met up with Ms Ong or the director and representatives of Litespeed prior to their

A subscription for an allotment of placement shares. At this stage, the prospectus dated 27 October 2005 was not ready and was not therefore made available to any of the plaintiffs.

B **[28]** After this meeting, D1 was informed that the second to fourth plaintiffs, ie Hamimie, Ibrahim and Mokhtar were interested in investing in Litespeed. Ms Ong testified that Nik Haniff Kamal and his officers contacted her and submitted the second to fourth plaintiffs' names.

C THE PROSPECTUS DATED 27 OCTOBER 2005

[29] In the interim on 27 October 2005 the prospectus for Litespeed was issued in conjunction with its listing of 32,500,000 new ordinary shares of ten sen each at an issue price of 47 sen per share. As such issuance was well after the D meeting on 3 October 2005, no prospectus was handed over to Dato' Ariff at the said meeting.

[30] Dato' Ariff testified that there was more than one meeting with Ms Ong and that he was given the prospectus at one of these meetings, subsequent to E 3 October 2005. In the course of cross-examination however he could not recall or estimate a date when such a meeting took place, subsequent to 3 October 2005.

[31] In so far as D1 is concerned, their position is that the prospectus was F made available to the plaintiffs together with the applications for subscription to the placement shares. Ms Ong denies any meetings subsequent to 3 October 2005 to specifically hand over the prospectus to Dato' Ariff.

[32] It is therefore in dispute whether the prospectus was in fact specifically G made available to Dato' Ariff between 3 October 2005 and 14 November 2005.

THE KEY STATEMENTS IN THE PROSPECTUS

H **[33]** The plaintiffs highlight the following key passages from the prospectus:

(a) the E-learning division of the Litespeed Group formed the dominant business focus and revenue stream for the group, and of the divisions' customers, iRead International Pte Ltd ('iRead') was the largest;

I (b) Litespeed earned a profit after tax of RM6,291,000 for the financial year ended 30 April 2005 which represented a more than 100% jump in its profits from the previous year;

(c) Litespeed recorded such a significant increase due to 'economies of scale'

with a 'higher revenue contribution from the E-learning division which has a higher profit margin in comparison to the education services divison'; and

(d) the prospectus contained a profit forecast which projected a profit after tax of RM7.511m for the financial year ending 30 April 2006. The assumptions underpinning the forecast were also provided.

[34] The plaintiffs highlight the fact that a profit forecast was not mandatory for the purposes of the listing, save that Litespeed or D1 would have to issue a negative statement in the prospectus on the exclusion of the profit forecast. D1 on the other hand, while accepting that the profit forecast is not mandatory maintained through its head of corporate finance, DW1 that the profit forecast had been included to ensure transparency. The directors of Litespeed would otherwise have had to provide a reason as to why no profit was forecast or disclosed. As they were bidding for more contracts than that included in the forecasts, they felt secure in disclosing the same.

THE RISKS AND CAUTIONS HIGHLIGHTED IN THE PROSPECTUS

[35] The defendants highlight the following clauses which they maintain highlighted the inherent risk in choosing to invest in these shares. These express terms specified that any investment in the shares of Litespeed would not result in guaranteed returns and potential subscribers were put on notice of the risks involved in investing in such shares and were advised to obtain professional advice before investing.

[36] For example the risks inherent in purchasing shares in a new MESDAQ company were highlighted in the prospectus in bold capital letters at the beginning:

> Investors should rely on their own evaluation to assess the merits and risks of the investment. In considering the investment, investors who are in any doubt as to the action to be taken should consult their stockbroker, bank manager, solicitor, accountant or other professional adviser immediately.

And:

> Characteristics of the MESDAQ market of Bursa Malaysia Securities Berhad — Investors should be aware that the MESDAQ market of Bursa Securities is a distinct market from the main and second board of Bursa Securities in many respects. In particular, companies listed on the MESDAQ market are subject to different quantitative and qualitative requirements, which have been primarily designed to accommodate high-growth and/or technology companies.

> Companies that are listed on the MESDAQ market may not have an operating history or any profit track record prior to listing. As such, whilst potential investment returns may be relatively high, companies listed on the MESDAQ market may be of higher investment risk.

[37] And under the heading 'Investment Considerations and Risk Factors' at para 3.1.1 of the prospectus it is stated that:

> LET Group has been profitable for the last three (3) financial years ended 30 April 2005 although it had in its initial years suffered some losses. There is no assurance that the LET Group will be profitable in future years. The Group's revenue and operating results are difficult to forecast and could be adversely affected by many factors. These may include, amongst others, the ability of the Group to secure new contracts from their clients, the ability of the LET Group to control unforeseen costs, unforeseen changes to the Group's operating expenses, the availability of human resources to meet market demand, …

THE LETTERS OF OFFER DATED 11 NOVEMBER 2005

[38] In or around early November 2005, D1 issued letters of offer dated 11 November 2005 ('the offer letters') inviting the second to fourth plaintiffs to subscribe for some of the placement shares on the specified terms. Attached to each offer letter was an acceptance form together with the prospectus. The three offer letters issued to the three plaintiffs are identical in terms of their content.

[39] Paragraphs 2.1 and 2.1.2 of the offer letters expressly provided that in accepting the offer of the placement shares, the subscribers had represented, warranted and undertaken to have made their own 'independent investigations in evaluating the merits and risks of acquiring the Placement Shares without reliance on any representation made by Hwang-DBS as Placement Agent or on any of its representatives or agents'.

[40] And para 3.4(a) of the offer letters specifies that:

> … by offering you the Placement Shares, Hwang-DBS is not making any recommendation to you nor advising you regarding the suitability or merits of any transaction you may enter into in connection with the Pre-listing Placement or otherwise …

[41] According to the prospectus and letters of offer, the offers to subscribe for the placement shares had to be accepted by 14 November 2005.

ACCEPTANCE FORMS DATED 14 NOVEMBER 2005

[42] Accordingly, on 14 November 2005, Hamimie, Ibrahim and Mokhtar duly signed the acceptance forms and submitted executed placement application forms also dated 14 November 2005 for the subscription of the number of placement shares specified. Subsequently they were informed that they had been successful in purchasing the following number of placement shares which were allotted to them:

(a) Hamimie	4,702,000 shares
(b) Ibrahim	5,000,000 shares
(c) Mokhtar	5,000,000 shares

[43] These shares were duly paid for vide three cheques issued by one Wangco Incorporated Sdn Bhd to D1 in the sums of RM2,350,000, RM2,350,000 and RM2,209,940.

LISTING OF LITESPEED SHARES ON MESDAQ

[44] One week after payment of the subscription price on the closing date of 14 November 2005, ie on 21 November 2005, Litespeed released its unaudited financial results for the quarter ended 31 July 2005 which recorded a loss of RM1.907m.

[45] The Litespeed shares were then listed on MESDAQ on 24 November 2005.

[46] On 30 December 2005 Litespeed announced its financial results for the second quarter ending on 31 October 2005 which disclosed a significant net loss.

[47] Litespeed's annual report for the following year, 2006 disclosed a significantly worse financial performance as it reported an audited loss after tax of RM9.870m. This was to be contrasted with the forecast financial performance which was stated to be RM7.511m in the prospectus. This therefore reflected a 231% deviation from the projected profit.

THE PLAINTIFFS' GRIEVANCES

Omission or non-disclosure of the financial performance of Litespeed for the quarter ended 31 July 2005 recording a loss of RM1.907m

[48] The plaintiffs complain that the defendants would have, or ought to

have been aware of the poor financial results for Litespeed for the quarter ended 31 July 2005 (ie the loss of RM1.907m) at the time of the meeting on 3 October 2005, yet they were not appraised or advised of the same.

[49] They go further to complain that by failing to make such disclosure, particularly by the time the prospectus was made available on 27 October 2005, D1 and D2 have effectively misstated the financial position of Litespeed in the prospectus. In other words the plaintiffs contend that there was a duty on the parts of D1 and D2 to ensure that all information pertaining to the financial position of Litespeed was accurate and current. The failure to include the quarterly accounts for the quarter ending July 2005, which showed a loss, therefore amounted to a failure to disclose material information which in turn amounted to negligent misstatement.

Deviation between the profit forecast in the prospectus and the actual financial performance of Litespeed for the financial year 2006

[50] The plaintiffs also complain of a further negligent misstatement. The prospectus disclosed that Litespeed had a substantial contract worth RM3,770,000 with iRead International Pte Ltd (as alluded to earlier). This disclosure it is contended was wholly inaccurate. This is because as of October and November 2005, iRead was already in default of its payment obligations as specified in an appendix to the contract which sets out the scheduled dates and quantum of payments due.

[51] Litespeed was then trying to recover monies due from iRead and had in May 2006 agreed on a revised payment schedule. Save for a sum of RM20,000 iRead failed to pay the balance sum owing which led to legal proceedings being filed in Singapore and a judgment being entered against iRead on 15 October 2007. The plaintiffs contend that D1 and D2 would, or ought to have been appraised of this fact and should have disclosed the same. This they maintain could have been achieved by producing a supplementary statement to the prospectus.

[52] Due to the omission of this salient information the reported audited profits for the year ended 2005, as well as the profit forecast for Litespeed contained in the prospectus, it is contended, was misleading. The prospectus with the omission of this information therefore presented a misleadingly optimistic picture of Litespeed's financial performance when its Litespeed itself, and its advisors, D1 and D2 knew or ought to have known and disclosed to all relevant persons the facts that:

(a) the unaudited financial performance of Litespeed for the quarter ended 31 July 2005 disclosed a significant loss;

(b) the future financial forecast which was premised on the contract secured with iRead was contingent in turn upon prompt payment by iRead of scheduled payments due from it in several instalments, but which were already in default at the time of the issuance of the prospectus; and

(c) further with respect to the profit forecast, the plaintiffs contend that the substantive deviation between the profit forecast and the actual performance arose because with respect to several items in the prospectus, such as the forecast on the LET Group, the iRead contract and the discontinuance of the Malaysian Ministry of Education's Teachers Portal discontinuance, the profit forecasts were unduly unrealistic and failed to take into account salient factors and conditions prevailing at the material time. In short the plaintiffs contend that if in fact the defendants had taken into account these prevailing factors, such an optimistic profit forecast would not have been specified in the prospectus. The plaintiffs maintain that the major revenue assumptions in the profit forecast were 'plucked out of thin air' as opposed to being founded on sound bases, and accordingly there was no substance to them. On this basis the plaintiff makes claim against the two defendants who were Litespeed's advisors, in respect of the losses they claim to have suffered, namely the cost of purchasing the subject shares.

TRIAL

[53] The trial of this matter took place over a period of two days on 21–22 May 2012. The four plaintiffs each testified at trial, although Dato' Ariff was the primary witness. They presented the entirety of the plaintiffs' case.

[54] D1 called three witnesses, namely Ms Soon Dee Hwee, the Vice-President, Corporate Finance Department of D1, Mr Chan Voon Jhin, DW2 and Ms Ong Hui Hui, DW3, the former representative of D1 who is alleged to have made the relevant 'representations' to Dato' Ariff.

[55] D2 called one witness, namely Valention Phua Cheng Lai, the senior manager incharge of the reporting accountants report at material time.

[56] The voluminous documents at trial were largely Part B documents, meaning that the maker was dispensed with while the contents remained in dispute. Accordingly exhibits were not marked singly. Counsel were at liberty

at all times to object to such documents as they saw fit.

ISSUES

[57] The salient matters that arise for consideration are as follows:

(a) whether D1 through Ms Ong Hui Hui was negligent (at common law), or in breach of its statutory duty, in making representations to the plaintiffs to the effect that Litespeed was a sound financial investment which was expected to yield a substantive profit in the future, when in fact such representations were false, untrue, inaccurate and/or misleading, and as a consequence of which the plaintiffs have suffered loss. In short the plaintiffs claim against D1 is premised on negligent misrepresentation;

(b) whether D1, as Litespeed's listing advisor (for the MESDAQ board) as well as its placement agent, was negligent and/or in breach of its statutory duty in failing to disclose Litespeed's quarterly accounts for the period ending July 2005, the omission of which gave rise to a negligent misstatement, namely that Litespeed was financially sound and a good investment prospect, when as a matter of fact, such representations were false, untrue, inaccurate and/or misleading, and caused the plaintiffs to invest in the same, resulting in losses;

(c) whether D2, as Litespeed's auditors and reporting accountants were negligent and/or in breach of its statutory duty in failing to disclose Litespeed's quarterly accounts for the period ending July 2005, the omission of which gave rise to a negligent misstatement, namely that Litespeed was financially sound and a good investment prospect, when as a matter of fact, such representations were false, untrue, inaccurate and/or misleading, and caused the plaintiffs to invest in the same, resulting in losses;

(d) whether D2, as Litespeed's auditors and reporting accountants, were negligent and/or in breach of its statutory duty in allowing or permitting or approving the positive financial forecast to be inserted in the prospectus, which inclusion gave rise to a negligent misstatement, namely that Litespeed was a good investment prospect, when as a matter of fact, D1 knew or ought to have known that the factual premise/consideration on which the forecast was based had altered or deteriorated materially as a consequence of which the forecast was inaccurate and/or misleading. This caused the plaintiffs to suffer loss; and

(e) whether D1 as Litespeed's listing advisor and placement agent was negligent and/or in breach of its statutory duty in permitting the inclusion of the positive financial forecast for 2006 in the prospectus, which inclusion gave rise to a negligent misstatement, namely that

Litespeed was a good investment prospect, when as a matter of fact, D1 knew or ought to have known that the factual premise/consideration on which the forecast was based had altered or deteriorated materially as a consequence of which the forecast was inaccurate and/or misleading. This caused the plaintiffs to suffer loss.

Each of these matters will be considered in turn.

Whether D1 through Ms Ong Hui Hui was negligent (at common law), or in breach of its statutory duty, in making representations to the plaintiffs to the effect that Litespeed was a sound financial investment which was expected to yield a substantive profit in the future, when in fact such representations were false, untrue, inaccurate and/or misleading, and as a consequence of which the plaintiffs have suffered loss

[58] The plaintiffs contend that D1, through Ms Ong Hui Hui, was effectively Dato' Ariff's and his family's financial advisor by reference to several corporate loans and transactions, namely:

(a) the RM38.8m loan to Borcos Shipping Sdn Bhd by DBS Bank Ltd. In this context Dato' Ariff testified that in or around September 2003, D1 advised and brokered the acquisition of NST Logistics Sdn Bhd by Syarikat Borcos Shipping Sdn Bhd and further advised and arranged for the said loan of RM38.8m to Borcos to facilitate the same;

(b) Dato' Ariff further testified that between July to December 2004, D1 advised and arranged an issuance of RM85m private debt securities to AWH Equity Holdings Sdn Bhd, the holding company of Borcos;

(c) between October 2003 to November 2005, D1 provided corporate and financial advisory services in the proposed initial public listing of Borcos and NST Logistics Sdn Bhd through a special purpose vehicle known as Borcos Bhd. In this transaction, D1 acted as advisers, underwriters and placement agents where their services included the preparation of the prospectus, applying to the Securities Commission and other related services;

(d) the issuance of a USD37m standby letter of credit to Wangco Incorporated Inc. By DBS Bank Ltd (Labuan). Dato' Ariff testified that in or around July 2005, D1 advised and arranged for this loan.

(e) In or around July 2005, D1 advised and arranged for a loan of RM46m to Wangco Incorporated Sdn Bhd from EON Bank; and

(f) a USD6m term loan from DBS Bank to Globrant. Here too, Dato' Ariff testified that in or about December 2005, the loan was procured through the advice and arrangement of D1.

[59] Dato' Ariff testified that D1 'advised and brokered' these various corporate transactions largely through Ms Ong Hui Hui, DW3. By reason of these matters Dato' Ariff maintained that Ms Ong Hui Hui, on behalf of D1, in effect took on the role of financial advisor to himself and by extension to his family and conglomerate of companies in which he had an interest, direct or indirect.

[60] Ms Ong Hui Hui disputed this contention maintaining that contrary to what Dato' Ariff stated, she had met Dato' Ariff on a few occasions but did not know him well. She maintained that she generally dealt with the personnel in his office, particularly one Encik Nik Haniff Kamal.

[61] She went on to testify that between 2003–2005, D1 was known as Hwang-DBS Securities Bhd and was a stockbroking company as well as a universal broker. This mean the types of services and products it could offer, particularly with respect to the grant of loans was limited. It could act as an advisor in corporate matters. However D1 was only licensed as an investment bank in January 2007. Ms Ong maintained that at the material time Hwang DBS Securities Bhd was neither the advisor nor arranger for items (a) and (d)–(f) above.

[62] She accepted that Hwang DBS Securities Bhd did act as the adviser, placement agent and managing underwriter for Borcos Shipping and as adviser for the proposed acquisition of NST Logistics. This came through Nik Haniff Kamal. Similarly she with respect to the AWH Equity Holdings Sdn Bhd transaction she accepted that Hwang DBS Securities Bhd acted as the co-financial adviser and co-arranger together with Mulpha Capital Markets Sdn Bhd for the exercise. She maintained that they were not the main advisors.

[63] In summary therefore, Ms Ong testified that D1's predecessor, Hwang DBS Securities Bhd had only dealt with one transaction for Borcos Shipping as set out in item (c) above and as a secondary advisor in the AWH Equity transaction, namely item (b) above. With respect to all the other transactions, in the course of cross-examination of Dato' Ariff it transpired that it was not in fact D1's predecessor itself that was an advisor.

[64] Ms Ong also stated that Hwang DBS Securities Bhd through its officers had dealt directly with Nik Haniff Kamal and others rather than Dato' Ariff. She described Dato' Ariff as a 'savvy' businessman and denied that she was his private and 'trusted personal advisor'.

[65] Having considered the competing testimonies of Dato' Ariff and Ms Ong Hui Hui, it is evident that their versions are diametrically opposite, making it extremely difficult for the court to conclude on the truth of either

version conclusively. This is particularly so because the evidence pertaining to the nature of their relationship is almost entirely oral and premised on the individual's impression of the nature of the same.

[66] However a consideration of the extent of the role played by D1's predecessor, Hwang DBS Securities Bhd in the series of transactions set out above discloses clearly that the latter played little or no role in most of the transactions apart from the two set out in items (b) and (c) above.

[67] It would therefore appear to this court that the role played by Ms Ong Hui Hui was not that of corporate adviser but more in the capacity of a placement agent who arranged for Litespeed's directors to make the requisite presentations to enable prospective investors to determine whether or not they were interested in investing in the company. While she may well have been optimistic about the performance of Litespeed, it does not appear from a consideration of the totality of the evidence that:

(a) representations in the form of the detailed account suggested by the plaintiffs through Dato' Ariff were in fact made by Ms Ong Hui Hui. The representations relied upon by the plaintiffs through Dato' Ariff are taken directly from the prospectus. The prospectus was only available in late October, ie after 27 October 2005. However, the evidence points to the fact that representations in the form suggested by the plaintiffs in fact transpired at the meeting on 3 October 2005 when a presentation on Litespeed was made by its directors. At that meeting such representations were evident in the information memorandum and the briefing by Litespeed's director. In other words the preponderance of evidence suggests that the 'representations' which the plaintiffs allege were made by D1 were in fact made by Litespeed's directors both orally and in the form of the information memorandum;

(b) it is not clear that a copy of the prospectus dated 27 October 2005 was handed over by Ms Ong Hui Hui to Dato' Ariff after the meeting on 3 October 2005 and before the issuance of the offer letters on 11 November 2005 which had annexed to them a copy of the prospectus. I so conclude because Dato' Ariff is unable to state approximately when such a meeting took place and because Ms Ong consistently maintained that she did not meet Dato' Ariff after the 3 October meeting, and denies handing over the prospectus to him personally. It would in fact appear that the prospectus was made available to the plaintiffs when the offer letters were dispatched to them on 11 November 2005, immediately before they subscribed to the shares. Again on a preponderance of evidence it is not clear that they therefore relied on the contents of the prospectus to make a decision to invest in Litespeed. Rather it would appear that premised on the oral representations made at the meeting on

3 October 2005 as well as the information contained in the information memorandum Dato' Ariff determined that Litespeed was a good prospective investment. The other plaintiffs do not appear to have relied on these representations but relied on Dato' Ariff to decide the matter for them; and

(c) the evidence of the second plaintiff, Hamimie does not assist in this matter. She testified that although she attended the meeting on 3 October 2005, she was not present throughout the presentation. She did not therefore hear Ms Ong Hui Hui make the representations that Dato' Ariff ascribes to her. Ms Ong too maintains that she did not speak to Hamimie on that occasion or at any other time. She did not meet or deal with the Ibrahim and Mokhtar at all.

[68] I have therefore concluded that Ms Ong and therefore D1 did not act as Dato' Ariff's or the plaintiffs' corporate adviser in respect of the Litespeed shares. Neither did Ms Ong Hui Hui take on the role of a general corporate advisor in relation to this transaction. D1's function appears to be limited to the role of assisting in the listing and in securing purchasers for the placement shares. It is in this latter capacity that D1 arranged for meetings with Dato' Ariff, namely to offer placement shares for Litespeed. Such a role did not envisage or entail D1 through its representatives making binding representations to prospective purchasers. This is clear from the information memorandum which specifically states as set out earlier the advice that prospective purchasers were investing at essentially their own risk.

[69] It follows from the foregoing that if D1 through Ms Ong Hui Hui did not act as a corporate advisor, nor make the representations she is alleged to have made, that the cause of action premised on negligent misrepresentation fails. This is because as a matter of fact it has not been established by the plaintiff on a balance of probability that Ms Ong Hui Hui on behalf of D1 did in fact make the representations ascribed to her. It is equally if not more probable that the representations referred to were in fact made orally by Litespeed's directors and by way of statements in the information memorandum. The statements in the information memorandum emanate from Litespeed's directors, not D1.

[70] Whether or not the several other elements of this cause of action in negligent misstatement are made out is irrelevant in view of my finding based on a consideration of the oral testimony of Dato' Ariff and Ms Ong Hui Hui to the effect that the plaintiffs have failed to establish that Ms Ong Hui Hui did in fact make the representations ascribed to her. Secondarily, there is insufficient evidence to establish that the plaintiffs relied on such alleged representations to make the decision to purchase or invest in Litespeed shares.

[71] In this context, it must be pointed out that the second to fourth plaintiffs, vide their pleadings and testimony made it clear that the alleged representations were only made to the Dato' Ariff. They conceded that they never met far less relied on any statements oral or written from D1. Only the second plaintiff, Hamimie stated that she read the prospectus. However she relied on the advice of Dato' Ariff, stating that 'my father informed that according to Ong Hui Hui Litespeed was a good investment and financially sound'. Accordingly there is no basis to conclude that the second to fourth plaintiffs received or acted upon or were induced by the alleged representations made by Ong Hui Hui. The element of reliance and inducement are therefore absent.

[72] Even if I am incorrect in so concluding on a consideration of the totality of the oral testimony presented at trial, it is evident from a perusal of the information memorandum and more significantly the letter of offer that the plaintiffs understood and undertook that they had made their own 'independent investigations in evaluating the merits and risks of acquiring the placement shares without reliance on any representation made by Hwang-DBS as placement agent or on any of its representatives or agents'.

[73] Further on in the offer letters it is also stated that: 'by offering you the Placement Shares, Hwang-DBS is not making any recommendation to you nor advising you regarding the suitability or merits of any transaction you may enter into in connection with the Pre-listing Placement or otherwise; …'

[74] It follows from the foregoing express exclusion or limitation that D1 made it expressly clear that the plaintiffs were bound to act on their own initiative and with the requisite professional advice independently obtained in determining whether or not to invest in the Litespeed placement shares. In the instant case the limitation or exclusion clause is worded specifically to meet a situation such as has arisen here, namely ascribing blame or liability to D1 for the investors' decision to invest in the Litespeed shares. This is not a general exclusion or widely worded limitation of liability clause. In these circumstances such clauses cannot simply be ignored. The plaintiffs by executing the letters of offer accepted these clauses as part of the binding contract for the purchase of the placement shares. As such the effect of these clauses ought to be given full effect. The net effect of these clauses is to exempt or exclude D1 from liability even if Ms Ong had in fact made the representations which are now ascribed to her by the plaintiffs.

[75] Therefore the plaintiffs' cause of action premised on negligent misrepresentation by D1 through Ms Ong Hui Hui fails.

Whether D1, as Litespeed's listing advisor (for the MESDAQ board) as well as its placement agent, was negligent and/or in breach of its statutory duty in failing to disclose Litespeed's quarterly accounts for the period ending July 2005, the omission of which gave rise to a negligent misstatement namely that Litespeed was financially sound and a good investment prospect, when as a matter of fact such representations were false, untrue, inaccurate and/or misleading and caused the plaintiffs to invest in the same, resulting in losses

[76] D1 was appointed as an advisor to Litespeed to assist it in its submissions to the authorities for approvals for the MESDAQ listing and in assisting Litespeed in preparing the prospectus. Ms Soon Dwee Hee, DW1, the witness for D1 explained that D1's duties included collating the information provided by Litespeed's auditors and reporting accountants, Ernst & Young as well as by Litespeed's directors for incorporation in the prospectus.

[77] D1 was tasked with ensuring compliance with regulatory guidelines and to seek the relevant authorities approval for the prospectus which was given. The Securities Commission approved the terms of the prospectus on 13 October 2005, while Bursa Malaysia approved Litespeed's share listing on the MESDAQ market which was to take place on 24 November 2005. The prospectus was therefore issued on 27 October 2005 to prospective shareholders.

[78] The plaintiffs' complaint is that D1 failed to ensure that the prospectus disclosed the losses for the first quarter of Litespeed's financial year ending 31 July 2005. In this context it is relevant that the Litespeed financial year end is on 30 April. As such for the year 2004–2005, it's financial year end would be 30 April 2005, which was the date up to which the prospectus furnished the audited accounts. For the year 2005–2006, Litespeed's financial year would end on 30 April 2006. As such the first quarter for this year would be from 1 May 2005–30 July 2005. The complaint is that this quarter's results, namely for the first quarter of 2005–2006 was not disclosed.

[79] The prospectus states that the reporting accountant's report was based on the proforma consolidated income statement of the Litespeed group of companies, not only Litespeed Education Technologies Bhd, up to and until 30 April 2005. The profit after tax for the year ended 30 April 2005 was RM6.291m. It did not purport to report financial performance beyond that date. The prospectus however is dated 27 October 2005.

[80] As the first quarter for the following year ended on 31 July 2005, the plaintiffs complain that these accounts ought to have been included to give a more accurate and realistic picture of the company's performance.

[81] Litespeed had to announce its results for the first quarter of the following year, namely for the quarter ending 31 July 2005 at least two market days before Litespeed's listing on 24 November 2005 in compliance with regulatory requirements. Litespeed so complied by announcing the first quarter's results ending 31 July 2005 on 21 November 2005. The unaudited quarterly report for the first quarter reported a net loss for the period of RM1.907m. This translated to a loss per share of 3.5 sen.

[82] DW1, Ms Soon testified that D1 was only made aware of the first quarter results between 18 and 21 November 2005, just before Litespeed's listing on 24 November 2005. As of these dates the plaintiffs had already purchased their shares. It was put to her in the course of cross-examination that D1 was in fact aware of the financial results of the company for both the first and second quarters, ie for the quarter ended 31 July 2005 and 31 October 2005 prior to the issuance of the prospectus on 27 October 2005. DW1 denied this.

[83] It was also suggested to her that D1 had deliberately delayed presenting or making known the results until the closing date was crossed and the shares were subscribed for by the plaintiffs. DW1 disagreed. It was suggested that D1 had failed to check or ascertain whether this information pertaining to Litespeed's financial results for the first quarter was in fact available prior to issuance of the prospectus. However DW1 maintained that Litespeed was still compiling the information at that stage and that it was not available yet, ie as of 27 October 2005.

[84] It was further put to DW1 that D1 had failed to verify whether there were any changes to Litespeed's affairs after 30 April 2005. DW1 disagreed maintaining that a due diligence had been conducted. She also disagreed that the prospectus essentially documented a 'sales pitch'.

[85] Considering the totality of DW1's evidence it appears that D1 was only appraised of the financial performance of Litespeed for its first financial quarter for the year 2005–2006, ending on 31 July 2005 on 18 November 2005, well after the issuance of the prospectus. These results were duly announced on 21 November 2005, days prior to the listing on 24 November 2005. DW1 insisted, and I accept her evidence, that D1 only knew about the results when Litespeed's directors made them available in or around 18 November 2005.

[86] DW1 also explained that as the quarter ending 31 July 2005 was the first quarter it was not possible to gauge with any degree of certainty whether or not the performance of the company would be good or adverse for the entire year as they were only appraised of the first quarter's results. She pointed out that often the more profitable quarters are the third and fourth quarters. For

this reason, given the uncertainty D1 took the view that there was no requirement to issue a supplementary prospectus.

[87] The plaintiffs also complain of losses of RM2.3m for the second quarter of the year 2005–2006, which ended on 31 October 2005. Again D1 through DW1 testified, and I accept her testimony, that D1 was only appraised of these second quarter results ending on 31 October 2005 after the listing on 24 November 2005. Litespeed in fact announced its second quarterly report on 31 December 2005. Given the lengthy disparity between the announcement of the second quarter results in December and the listing well before that in November 2005, it would not have been possible for D1 to know or announce or disclose these profits prior to the listing. As the prospectus was dated 27 October 2005 it would not have been possible to include these results given that D1 had no knowledge of these financial figures.

[88] The primary issue that falls for consideration here is whether:

(a) D1 was under a duty to ascertain or verify the financial performance beyond 30 April 2005 for the purposes of the prospectus; and

(b) whether D1 deliberately withheld or suppressed information pertaining to the poor financial performance of Litespeed in order to boost or augment or induce prospective buyers to invest in these shares, despite being aware of its poor financial performance.

[89] With respect to D1's duties, it would appear from the verification report which sets out the varied duties of the professional advisers for the listing of Litespeed on the MESDAQ board that matters pertaining to financial matters particularly income statements, balance sheets and financial statements lay primarily with Litespeed itself as well as D2, Ernst & Young. D1 in this same report was tasked with verifying, inter alia:

(a) the issue price;

(b) details of the public issue and basis of arriving at the issue price;

(c) brokerage, underwriting and placement fees;

(d) restructuring and listing exercise;

(e) declarations of no conflict by advisors; and

(f) procedure for application and acceptance

[90] The foregoing is not in dispute. It follows from the foregoing that D1's scope of duties did not entail a verification of the accounts, particularly not unaudited financial performance records for the first two quarters of the year 2005–2006. The prospectus was stated to cover financial performance until

30 April 2005 only, namely for the financial year 2004–2005:

(a) as such it cannot be concluded that D1 had a duty to ascertain and then disclose financial accounts for a period beyond that specified in the prospectus when such verification fell to be conducted by D2 and Litespeed itself. It would amount to an unfair extension of D1's duties to conclude that it owed a duty to the prospective purchasers to exert the initiative to ascertain financial performance beyond the period specified in the prospectus. In other words, D1 had no duty, given the scope of its works, to initiate, ascertain and verify accounts for Litespeed for the first and second quarters of the financial year 2005–2006;

(b) this is particularly so, given that D1 was not appraised of the first quarter profits showing a loss of RM1.907m until 18 or 21 November 2005, by which time the plaintiffs had already subscribed for the shares and listing was due in a matter of days on 24 November 2005. As D1 did not know of these results at the time of issuance of the prospectus on 27 October 2005 or soon thereafter, it was not possible for D1 to provide further disclosure or produce a supplementary prospectus before 18 November 2005. As of the date when D1 was appraised of the first quarter results in November 2005 it was too late to provide further disclosure. In any event I also accept DW1's evidence that the first quarter results in themselves at that stage could not indicate with any degree of precision how the company would fare throughout the course of the year, particularly given that payments tended to come in, in the later quarters, ie the third and fourth quarters; and

(c) there is insufficient evidential basis for this court to conclude that D1 deliberately withheld or suppressed information pertaining to the losses relating to these two quarters with the specific purpose of promoting sales of the placement shares. The evidence in fact discloses that D1 was only appraised of the first quarter results days before listing (by which time the plaintiffs had already subscribed) and of the second quarter results in December 2005, well after the listing. This has not been successfully challenged. As such if D1 was not aware of these results, it cannot be said that it withheld or suppressed such information. It is only if D1 had knowledge of these results that it could so withhold or suppress such information.

[91] Further, given the scope of duties of D1 as outlined above, and which envisaged that D2 and Litespeed would verify financial performance, D1 was entitled to rely on D2's confirmation of the same, as the party directly responsible for an assessment of financial perforamance.

[92] Given my findings above, it follows that D1 did not omit or deliberately withhold salient financial information as alleged by the plaintiffs. Given their

lack of knowledge at the material time it cannot be said that there was any negligent misstatement on their part. As there was no further duty on their part to investigate and verify financial performance beyond 30 April 2005, it cannot be concluded on that basis that they breached a duty of care. In other words, D1 had no duty of care to ascertain and verify the financial performance for the first and second quarters of 2005–2006 and report on the same as is now alleged by the plaintiff. As they owed no such duty of care to prospective purchasers including the plaintiffs, there can be no liability under this head against D1.

Whether D2, as Litespeed's auditors and reporting accountants were negligent and/or in breach of its statutory duty in failing to disclose Litespeed's quarterly accounts for the period ending July 2005, the omission of which gave rise to a negligent misstatement, namely that Litespeed was financially sound and a good investment prospect, when as a matter of fact, such representations were false, untrue, inaccurate and/or misleading, and caused the plaintiffs to invest in the same, resulting in losses

[93] As the reporting accountant, D2 prepared a report on the proforma consolidated balance sheets of Litespeed as well as the Litespeed Education group of companies. It also prepared a letter on the consolidated profit forecast of the group and a reporting accountant's report for inclusion in the prospectus. It is necessary to first consider the context and scope of the reporting accountants' report. This is set out in D2's report/letter to the directors of Litespeed dated 14 October 2005. ln the said letter D2 specifies that:

(a) their duties pertain to reporting on the pro forma consolidated balance sheets as set out in the prospectus which have been prepared for illustrative purposes only, to provide information as to how the balance sheet of the Litespeed Group of companies as at 30 April 2005 might be affected by the public issue of 32.5 million new Litespeed shares at an issue price of 0.47 sen payable upon the listing of the company on the MESDAQ market;

(b) the preparation of the pro forma consolidated balance sheets in accordance with the guidelines issued by the Securities Commission prospectus Guidelines was the sole responsibility of the directors;

(c) the auditors', ie D2's responsibility was to form an opinion, as set out in the Guidelines and to report its opinion to Litespeed. Their work comprised primarily of comparing unadjusted financial information with the original work considering adjustments and discussing the balance sheets with officers of Litespeed; and

(d) D2 specified that their work involved no independent examination of any of the underlying financial information other than a review of the audited financial statements of the group which included the audited balance sheet as of 30 April 2005 only.

[94] It is evident from a perusal of the scope of D2's work that it was limited to forming an opinion after discussion with the relevant officers of Litespeed, the audited balance sheet and accounts for the period ended 30 April 2005. More significantly they had no duty to independently examine the underlying financial information.

[95] The plaintiffs' grievance in respect of this issue is that D2 was negligent in failing to disclose the first quarterly reports for the year 2005–2006 ending 31 July 2005. The first issue that therefore requires consideration is whether D2 was in fact aware or had knowledge of those accounts for the term ended 31 July 2005, yet failed to disclose the same in the prospectus dated 27 October 2005.

[96] The evidence at trial in the course of the cross-examination of D2's witness, one Valentino Phua Cheng Lai, DW4 ('DW4') was as follows:

Q: If you look at page 340, the quarter ended 31 Oct 2005, it was then announced on 30 December 2005. So it came out within two months. Now, let's go back to page 325. These results of the quarter ended 31 July 2005, took about four months to come out correct?

A: Yes

Q: My question to you is that these results would have been available before the prospectus was issued, isn't that correct?

A: It was never made available to us.

Q: You never asked for them?

A: The company has, the company has uh …

Q: No my question to you is, did you ask for them?

A: Ask from them from which period to which period.

Q: For this quarter after the end of the quarter 31 July 2005, did you ask for the results at any time up to the date of the prospectus?

A: Up to the date of our auditor's report, yes.

Q: You never got them?

A: We only got, I can't remember.

Q: What you got, you did not reveal that's my question to you. Do you agree with me? Do you agree with me or not.

A: Agree in what way.

Q: That the company had poor results for the first quarter ended 31 July 2005.

A: As far as the company is concerned, uh … the results of the company …

Q: No, would you agree with me that you never revealed the poor results on 31 July 2005?

A: I don't get your question.

Q: What was the date of the accountant's report?

A: The date of the accountant's report is I think October.

Q: Yes

A: The date of the accounts is 1st of August.

Q: So you did not ask for anything after 1st of August.

A: After, yes.

Q: Alright I put it to you, you should have asked, do you agree with me or not?

A: As far as uh …

Q: No. Would you agree with me that you should have asked for the accounts after the 1st of August up until the date of your prospectus.

A: Yes we would have asked.

Q: You would have asked or you should have asked?

A: I … I would have asked.

Q: You did not receive it.

A: We did not receive it.

Q: You did not query it.

A: We did not query because, they, they have certain amount of time to come out with a set of financial statements.

Q: So you did not insist for the purposes of the prospectus?

A: I can't remember that.

…

[97] In the course of re-examination these issues were clarified further:

Q: Valentino let's take your last few questions first. When you say that the company had a certain amount of time to come up with the publication of the first and second quarter results. I don't know how much time exactly was that.

A: I think it's based on Bursa's listing requirement.

Q: To your recollection, how many months?

A: Uh …

Q: You can extend?

A: For a listed company I know it's two months.

Q: How many?

A: Two months after the first quarter.

Q: Now when you say you were referred to the first quarterly and second quarterly result of 2005, which was announced on 21 November 2005 and 30 December 200. Both sets were unaudited.

A: That's correct.

Q: Right when were you made known of this unaudited document? After the date of your accountant's report or before?

A: It's actually after the date of the accountants report.

Q: After 14th October 2005

A: That's correct

…

[98] It is therefore not in dispute that the directors as a matter of fact only made available the first quarterly results ending 31 July 2005, on 21 November 2005. That is the date of announcement of their unaudited results, although DW2 had indicated that D1 had possibly received the same on 18 November 2005.

[99] Therefore it follows from a consideration of these dates alone that as the prospectus is dated 27 October 2005, D2 had no knowledge of the first quarter unaudited accounts as of the date of the issuance of the prospectus on 27 October 2005. (D2 in fact issued its report on the accounts as of 1 August 2005). If D2 had no knowledge of the accounts of the first quarter ending 31 July 2005 as of October 2005, then it follows that D2 could not disclose the same. And as such the question of suppressing or failing to disclose the same does not arise. Therefore D2 cannot be said to have failed to disclose or suppressed material information within its knowledge.

[100] However the matter does not end there. The plaintiffs contend that D2 owed a duty of care to prospective purchasers relying on the prospectus to have asked for the first quarterly accounts and to have reported the same. In determining whether such a duty of care does in fact subsist, the scope of works undertaken by D2 becomes relevant. A perusal of the same as set out above discloses that D2 was only under a duty to form an opinion on the audited accounts of Litespeed up to and until 30 April 2005. Such a duty did not extend to periods beyond that date.

[101] However it is contended by the plaintiff that in its report D2 has stated as a matter of fact that it was not aware of a change in the circumstances pertaining to the financial position of the Litespeed Group when it issued its report dated 1 August 2005. The plaintiffs complain that given the losses incurred as of 31 July 2005 this is a clear misstatement.

[102] While a direct comparison on hindsight of the figures for the first quarter ended 31 July 2005 does indeed disclose a loss, it is evident from the evidence I have set out above that D2 was not appraised of these results until well after the issuance of the prospectus dated 27 October 2005. They were not given the results for the first quarter despite DW4 having testified that they asked for the same. The directors simply did not make the information available despite request. As such when D2 made its statement as of 1 August 2005, it did so with all the information within its possession. There was no question of suppression or a failure to disclose or even a failure to ask for results after 31 July 2005. In all these circumstances, it is difficult to conclude that D2 is culpable in terms of negligent misstatement. The statement issued by D2 was at the material time accurate to the best of its knowledge and efforts to ascertain the financial status of the company. The situation was compounded by the fact that there was no requirement for Litespeed, which was then not listed, to make disclosure of its accounts within any specific period. The position altered upon listing when it became incumbent upon the listed company to make disclosure of its audited financial performance within two months of the close of a quarter. Accordingly the results for 31 October 2005 were made available before 31 December 2005. For the July quarter however, there was no such requirement, hence the delay by the directors in announcing the same, some four months later.

[103] The case of *Boyd Knight v Purdue* [1999] 2 NZLR 278 determined by the Court of Appeal in New Zealand is instructive. In that case a firm of auditors provided a report for a failed finance company, whose business consisted of the borrowing of money from the public and on-lending it at a margin. From time to time the finance company issued prospectuses. The claim related to one particular prospectus which contained a report by the auditors which stated that the financial statements in the prospectus gave a true and fair view of the state of affairs and changes in financial position of the issuer and guaranteeing subsidiaries, and that the amounts stated in the statements had been correctly taken from audited financial statements. As a result of some fraudulent activity and fictitious loan accounts the shareholders' funds were in fact overstated by 1.15m dollars. While the court found that there existed a sufficient proximity between the auditors and potential investors which placed a duty on the auditors to be careful in their issuance of certificates, the court found that there was no liability on the part of the auditors because it was insufficient to create liability that an investor had relied in a general way on the

existence of the prospectus and the regulations. There must have been a reliance on the basic features of the financial statements. It was held that the investor had to prove that he or she paid attention to the content of the financial statements and noted these basic features. The court held as follows:

> … When auditors furnish a report for inclusion in a prospectus they express an opinion about the financial statements of the company which they have audited: they confirm the accuracy of those statements in the sense of that word used above. However they are not called upon to make any comment on the state of the company's affairs. They undertake no duty to assess for would-be investors whether it is creditworthy. Their duty is to inform, not to give advice. The record shown by the financiai statement speaks for itself. The true and fair view may be one of the prosperity or poverty. The report therefore has no context for anyone who has not read the accounts. Without such a reading the report telis the reader nothing except that the company has a set of accounts which comply with the regulations and present a true and fair view. In so far as such a report refers to a true and fair view, it is almost meaningless unless read in conjunction with the figures in the accounts. It must follow, it seems to me, that in so certifying the accounts the auditors cannot be taken to have accepted an obligation to an investor who has not read and relied upon them. Reliance, and a consequential duty of care, cannot be asserted, as it were, in a vacuum. There must first have been a specific influence of the financial statements on the mind of the investor. It is not enough for the investor to say that, without troubling to look at the accounts, he or she relied in a general way upon the statutory scheme, making an assumption that an investment is sound or the issuer creditworthy because there was a trustee playing a supervisory role in connection with the prospectus and an auditor had furnished the report required by the regulations.

[104] The court went on to conclude that it would be placing an undue burden on the auditor to hold them accountable for the accuracy of figures which were not relied upon by the plaintiff investors. In that case there was a careless error. In the instant case no question of an error arises.

[105] However the parallel to be drawn here is that the plaintiffs, particularly the second to fourth plaintiffs did not rely in a specific way upon any of the information set out in the prospectus. As stated above a general reliance is insufficient. The plaintiffs are bound to show that the information issued by the accountants worked so as to exert a specific influence on their minds and as a consequence of which they were induced to purchase the shares. That has not been made out in the instant case which is another reason why the plaintiffs' claim against D2 in this regard fails.

Whether D2, as Litespeed's auditors and reporting accountants, were negligent and/or in breach of its statutory duty in allowing or permitting or approving the positive financial forecast to be inserted in the prospectus, which inclusion gave rise to a negligent misstatement namely that Litespeed was a good investment prospect, when as a matter of fact D1 knew or ought to have known that the factual premise/consideration on which the forecast was based had altered or deteriorated materially as a consequence of which the forecast was inaccurate and/or misleading. This caused the plaintiffs to suffer loss

[106] The plaintiffs claim that D2 in reporting or confirming that Litespeed had earned a profit after tax of RM6,291,000 for the year ended 30 April 2005, were culpable of misrepresentation or negligent misstatement because there was a deviation of some 231% between the forecast financial performance and actual performance which the plaintiffs attribute to the fact that the major revenue assumptions, known as specific assumptions, had no substance behind them, for the reasons stated below:

(a) such forecast profit after tax included revenue amounting to RM3,770,000 from a contract between Litespeed and iRead International Pte Ltd ('iRead'), when as a matter of fact, save for a deposit of RM500,000 the balance of the said sum of RM3,770,000 was never paid by iRead to Litespeed;

(b) with regard to the Catch Them Young campaign, there was no highlighting of the fact that withdrawals from many schools had already been anticipated due to the shortening of the school week from 5 1/2 days to five days in August 2004;

(c) with respect to the forecast for some of the projects in the year 2006, the projection was RM2.5m while the deviation was RM2.49m, meaning that the target was missed which in turn demonstrates, according to the plaintiffs that it was wholly unrealistic. This ought to have been highlighted by the auditors; and

(d) the forecast for the Teachers' Portal Project failed to highlight the fact that it was about to lapse and come up for renewal or discontinuance. Instead the forecast was that RM4.7m would be generated. In reality the project which was supposed to be up for renewal tender in 2005 was discontinued resulting in no revenue whatsoever being generated.

[107] From the foregoing, it is evident that the plaintiffs' complaint is that the assumptions pertaining to the financial forecast were wholly unrealistic, and as a consequence, misleading to prospective purchasers such as the plaintiffs, when risks of non performance of various contracts, or assumptions made on contingent bases, were not highlighted. No proper qualifications were

made or highlighted. No attempt, it is contended, was made to verify the matters set out in the assumptions.

The reporting accountant's scope of duties

[108] D2 in response to the foregoing points to its scope of duties as set out above and maintains that as reporting accountant, their report presented the historical financial information of the group on a pro forma basis and for illustrative purposes only. D2 maintains that it was not within its scope of work to carry out an independent examination of any of the underlying historical financial information.

[109] Further the historical financial information was based on the audited financial statements of the group for the period financial year ending 30 April 2005. There were no audited financial statements made available to the reporting accountants for the period subsequent to 30 April 2005.

[110] D2 further highlights that it did not give any opinion on the achievability of the profit forecast which in any event was prepared by the directors, not D2. On the contrary, D2 points to the caution it had sounded about the uncertainty of the profit forecast provided by the directors, which states as follows:

> The Directors of LET forecast the consolidated profit after taxation for the financial year ending 30 April 2006 will be as follows
>
> Profit after taxation 7,511,000
>
> A forecast in this context, means prospective financial information prepared on the basis of assumption as to future events which management expects to take place and the actions which management expect to take as of the date the information is prepared (beset-estimate assumptions). *In particular, forecast of consolidated profit after taxation are substantially dependent on the achievability of the Specific Assumptions as set out in Section 10.6 of the prospectus. While information may be available to support the assumptions on which the forecast are based, such information is generally future oriented and therefore uncertain. Thus, actual results are likely to be different from the forecast since anticipated events frequently do not occur as expected and the variations could be material.* (Emphasis added.)

The specific assumptions

[111] As set out above it is expressly stipulated that the forecast of consolidated profit is substantially dependent on the achievability of the specific assumptions. In relation to these specific assumptions, the preamble to the same sounded the following cautionary note:

> The profit forecast for the financial year ending 2006 have been prepared based on a set of assumptions made by the directors, which includes significant assumptions about future events and outlook that may not necessarily occur. In particular, the forecast are dependent on the achievability of the Specific Assumptions as set out below. Forecast of results will be materially affected by economic, other circumstances and should the actual events differ from those specific assumptions, and for these reasons, the actual results may vary considerably from the forecast.

[112] In this context it is relevant that it was emphasised by D2 at several points including the foregoing paragraphs that:

(a) the makers of the financial forecast for the group for the financial year ending April 2006 was the directors of the Litespeed Group and not D2. D2 did not assume responsibility for the actual quantum of profit forecast. That responsibility remained with the directors;

(b) the 'accuracy' or 'reliability of the financial forecast was dependent upon the reasonableness or veracity of the specific assumptions which had been detailed specifically. It was cautioned that a variation of those assumptions brought about by economic or other circumstances could result in a considerable variation from the financial forecast of RM7,511,000 for the year ending April 2006; and

(c) responsibility for the accuracy and reasonableness of the specific assumptions lay with the directors.

[113] That the directors assumed full responsibility for the veracity of the matters forming the basis for the specific assumptions is expressly stipulated at para 10.7 of the prospectus:

> The Directors of LET have reviewed and analysed the reasonableness of the bases and assumptions stated therein after due and careful inquiry in arriving at the consolidated profit forecast of the LET Group for the FYE 30 April 2006. The Directors of LET are of the opinion that the consolidated profit forecast is fair and reasonable in light of the future prospectus of the LET Group, the future plans and strategies to be adopted by the LET Group and after taking into consideration the estimated level of gearing, liquidity and working capital requirements of the Group.

[114] It does not follow therefore that D2 had assumed or undertaken responsibility for the veracity of these bases forming the basis of the assumptions.

What was the reporting accountant's role in relation to the financial forecast?

[115] This begs the question, what then did D2 actually do with regards to the financial forecast? What was its role? This is answered by a perusal of the

'Reporting Accountants Report on Profit Forecast' dated 14 October 2005 addressed to the directors of Litespeed. From that document it appears that the role of D2 was to:

(a) review the forecast of the consolidated profit after tax of the Litespeed group for the year ended April 2006 in accordance with the professional standards in Malaysia applicable to the review of forecast;

(b) the review was undertaken with a view to tendering an opinion as to whether such forecast was properly prepared on the basis of the specific assumptions; whether the forecast was presented on a basis consistent with the accounting policies adopted by the group; and

(c) D2 again reiterated that the directors of the group were solely responsible for the preparation of the profit forecast and the assumptions. They also cautioned that the factual basis for the specific assumptions was 'future-oriented and therefore uncertain.' Accordingly a substantive variation from the forecast was 'likely to be different'. In other words D2 cautioned of the real possibility of a substantive deviation which in fact is precisely what occurred.

[116] Having set out the scope of their duty and the limitations to be expected in respect of any financial forecast, D2 concluded as follows by way of a limited opinion:

> Subject to the matters stated in the preceding paragraphs, in our opinion, *the forecast of consolidated profit after taxation, so far as the calculations are concerned, have been properly compiled on the basis of the assumptions made by the directors and are presented on a basis consistent with the accounting policies normally adopted by the Group*.

[117] The financial forecast and the reporting accountant's opinion above were included in the prospectus. It is evident from a perusal of the same that D2's function was to review and ascertain that:

(a) the forecast had been 'properly compiled' in so far as the calculations were concerned, premised on the basis of the assumptions made by the directors. This meant that D2 reviewed the forecast in terms of calculations, utilising the assumptions made by the directors, and found the same to be adequate. D2 did not assess or review the veracity, accuracy or probability of the assumptions themselves; and

(b) secondly, D2 opined that the calculations for the financial forecast was made or presented in compliance with accounting policies normally adopted by the group.

[118] It cannot therefore be said that D2 was responsible for holding out or verifying the accuracy of the factual matrix underlying the specific

assumptions. Those matters were entirely within the purview of the directors as was made known and clear to any prospective reader of the prospectus interested in investing in Litespeed.

An examination of the specific assumptions

[119] I have set out above the specific grievances raised by the plaintiff in relation to the deviation in the profit forecast based on the variation which occurred in relation to the specific assumptions.

The iREAD contract

[120] The grievance with regards to the iRead contract is two-fold. For the financial year ended 30 April 2005, ie for the period relevant for the purposes of the prospectus and D2's opinion as reporting accountant, the plaintiff complains that the profit after tax of the group was misleading because it took wholly into account revenue amounting to RM3,770,000 earned from a contract between Litespeed and iRead International Pte Ltd, when this sum was never paid in full save for a sum of RM500,000 by way of deposit.

[121] In this context therefore the issue of whether as a matter of fact the revenue of RM3,770,000 was recognised as revenue to Litespeed which comprised a part of the profit after tax of the group for the period needs to be considered, as well as whether such recognition of the revenue was correct. It is not in dispute that under the First iRead Contract, Litespeed was engaged to develop, supply, install, test and commission a diagnostic assessment system as well as some E-learning modules and products for a total contract sum of RM3,770,000. Delivery of the various modules comprising a part of the contract were to be delivered in stages to iRead in accordance with Appendix A to the First iRead contract. Under the payment schedule, RM200,000 was payable on or by 10 April 2005, the next RM300,000 on or by 10 June 2005, the third instalment of RM600,000 on or by 10 October 2005, the fourth instalment of RM770,000 by 10 December 2005, the sixty of RM800,000 by 10 February 2006 and the final instalment of RM1,100,000 on 10 April 2008.

[122] Pursuant to the First iRead contract, Litespeed supplied all the deliveries under the contract to iRead. On the same day, Litespeed issued an invoice for the total contract sum to iRead. As of 25 January 2005 therefore Litespeed had complied with all its obligations for delivery under the First contract, hence the invoice. Modules worth the entire contract had been supplied. As such, D2's witness, DW4 explained that the total contract sum of RM3,770,000 was recognised and treated as revenue of Litespeed. This was

utilised in the financial forecast which the plaintiff contends is misleading and erroneous because this money was not actually received by Litespeed, save for the deposit.

[123] This begs the question how or why the said contract sum of RM3,770,000 was recognised as revenue prior to its actual receipt. Under its general accounting policies on revenue recognition, D2 stated:

> (m) Revenue recognition
>
> (ii) Rendering of services
>
> Revenue from provision of services are recognised upon rendering of services.
>
> (iii) Sale of goods
>
> Revenue is recognised upon the transfer of significant risk and rewards of ownership of the goods to the customer which generally coincides with delivery and acceptance of the goods sold.

[124] DW4, an accountant further explained that the recognition of the revenue amounting to RM3,770,000 under the First iRead contract was in compliance with the applicable accounting standard on revenue recognition in the Malaysian Accounting standards Board, Standard 9 on Revenue.

[125] The relevant portion of MASB 9 at para 8 defines revenue as 'the gross inflow of economic benefits during the period arising in the course of the ordinary activities of the enterprise when those inflows result in increases in equity, other than increases relating to contributions from equity participants'.

[126] With respect to the sale of goods, para 15 of MASB 9 stipulates:

> Revenue from the sale of goods should be recognised when all the following conditions have been satisfied:
>
> (a) the enterprise has transferred to the buyer the significant risks and rewards of ownership of the goods;
>
> (b) the enterprise retains neither continuing managerial involvement to the degree usually associated with ownership nor effective control over the goods sold;
>
> (c) the amount of revenue can be measured reliably;
>
> (d) it is probable that the economic benefits associated with the transaction will flow to the enterprise; and
>
> (e) the costs incurred or to be incurred in respect of the transaction can be measured reliably.

[127] As all the deliverables the First iRead contract had been delivered to iRead by Litespeed, as had the invoice it followed that the significant risks and rewards of ownership of the modules under the contract had been transferred to iRead. The revenue could, in accordance with accepted accounting standards therefore be recognised for the financial year ending 30 April 2005, which is what D2 accepted. They cannot be faulted for doing so. It would appear that they were fully entitled to recognise the revenue because the said sum of RM3,770,000 was payable by iRead to Litespeed.

[128] In so far as the provision of maintenance and technical support for a period of 12 months was concerned, D2 acted in accordance with accounting standards by according recognition to revenue by reference to the stage of completion of the transaction at the balance sheet date, which was 30 April 2005. Such services had commenced on 25 January 2005. It therefore accorded a revenue recognition for a period of approximately four months technical support while the balance was treated as deferred revenue.

[129] The plaintiffs maintain that the recognition of revenue above is flawed as it is only when a sum is paid to, or collected by Litespeed that it can be recognised as revenue. However as shown above under the Malaysian Accounting Standards Board 9, actual payment or collection is not a precondition for recognising revenue. I accept that D2 acted in accordance with established and approved Malaysian Accounting practices and therefore ought not to be faulted for such recognition of revenue.

[130] Further and in any event, D2 maintains that it had never made any representation that all the revenue recognised had already been collected, when PW1 was cross-examined:

> Q: Did the 2nd Defendant in his report tell you that this 3.77 million had already been collected by the Company?
>
> A: That's the impression …
>
> Q: No, my question, did …
>
> A: No, no, no but between the lines, that's what …
>
> Q: So your answer is, yes or no?
>
> Court: Let's take the question. Did DW tell you that the 3.77 miliion …?
>
> Q: … was actually kept, been collected by the Company>
>
> Court: Had been collected and your answer, Dato'?
>
> A: No. It doesn't say that, but … but the impression is that it's collectable. It's a good debt, good customer, the best customer, all these.

[131] It follows from the foregoing that the PW1 was aware that the entire sum of RM3.77m had not been collected in full. However he was of the view that as the revenue had been recognised there was no question or suspicion of default.

[132] As a matter of fact when the D2 provided its report for the financial year ended 30 April 2005 on 1 August 2005, payment under the first two schedules of payment as set out above had already been paid, totalling RM500,000. The next or third instalment was due in October 2005, which was the following financial year. Accordingly in compliance with accounting standards, the assumption was made that the revenue would come in as contracted.

[133] DW4 further explained that if subsequent to such recognition of revenue it came about that there was uncertainty arising about the collectability of the quantum already recognised, then the uncollectable sum would be regarded as a doubtful debt. Accounting treatment for a doubtful debt is to provide for it as an expense. The issue an adjustment of the recognised revenue to 'correct' the initial recognition does not arise. This is accepted accounting practice as recognised by para 19 of MASB. In this context para 19 of MASB provides:

> … However when an uncertainty arises about the collectability of an amount already included in revenue, the uncollectable amount or the amount in respect of which recovery has ceased to be probable is recognised as an expense, rather than as an adjustment of the amount of revenue originally recognised.

[134] It would appear that there has been compliance with the Malaysian Accounting Standards Board in the treatment of that portion of the First iRead contract monies that could not be recovered, after recognition of revenue. Therefore it cannot be said that D2 acted negligently or made a negligent misstatement or gave misleading information in the prospectus by treating the revenue due from iRead as recognised revenue.

[135] Subsequently the year that followed when it became evident that iRead was having difficulty, the payments were rescheduled and when iRead failed to honour the rescheduled payments due, full provision was made for the balance sum due and owing as a doubtful debt.

The second iREAD contract

[136] This issue is relevant to the issue of the deviation in the profit forecast. It is separate and different from the first iRead contract. The second iRead contract was to be concluded in the financial year ending 30 April 2006. As a

matter of fact this second iRead contract was a specific assumption underlying the profit forecast prepared by the directors. It was anticipated to be procured for the year 2006 and to bring in a revenue of RM3.3m. It was put to DW4 by learned counsel for the plaintiff that the anticipated revenue of RM3.3m for this second iRead contract had been simply 'plucked out of the air by the directors', which DW4 denied.

[137] The second iRead contract was supposed to follow on from the first but did not. The feasibility and viability of the second iRead contract was not a factual premise that D2 as reporting accountants were bound to opine upon as being a certainty or otherwise. The scope of D2's function in relation to the forecast has been set out above. They were under no duty to assess or foretell whether the various contracts and projected income bringing projects would, as a matter of fact be completely or partially successful or otherwise. Their duty was to review the mode of calculation of the profit forecast and to ascertain that it was premised on matters compliant with established practice. It would appear that they did so. But they could not, in respect of the financial year ending 30 April 2005, on 1 August 2005 have foretold with any degree of certainty or at all, whether the projected incomes would in fact materialise the following year. Hence the cautionary paragraphs throughout the prospectus to prospective purchasers warning them of the possibility of significant variations in the projected profits based on the real possibility of significant variation in the specific assumptions, of which the second iRead contract comprised one risk factor.

The E-learning contracts

[138] The profit forecast was also premised on a specific assumption that Litespeed's E-learning contracts would be fully achieved. In their report for the financial year ending 30 April 2006, Litespeed disclosed that the significant deviation in the group's financial forecast was largely attributable to the group's inability to achieve E-learning contracts which were required to sustain its costs of sales and operating expenses. It is evident that the group's inability to achieve the E-learning contracts can hardly be attributed to D2. It would have required an ability to foretell for the reporting accountant to have stated in its report in the prospectus that the group would fail to achieve most of its E-learning contracts. More importantly, that is not the function of the reporting accountant and to extend D2's duty to that extent would be unjustifiable.

[139] The foresee ability of the success or otherwise of the targets set for the procurement of E-learning contracts lies with the directors in any event as was clearly spelt out by D2 in its report and in the course of the prospectus. Those express statements seeking to limit the scope of their work, and sounding a cautionary note, cannot simply be ignored or treated as 'puff'. The words and

clauses, so closely set out next to the actual financial forecast, and which are directly relevant to the same, and which warns purchasers to be aware of the real danger of a significant variation, as well as the reminder to obtain independent advice together have to be given real consideration.

[140] To my mind the net effect of these multitude of clauses is to expressly limit the duty of care of both D1 and D2 to the actual scope of their work in relation to the statements in the prospectus. It appears clear to this court that the primary reason for the significant deviation in the profit forecast was the variability of the factual premises comprising the basis for the forecast. These bases were put forward by the directors not D2. D2 was moreover not in a position to verify or foretell the outcome or success of such proposed contracts. Neither was D2 tasked to do so. Therefore D2 cannot be held liable for the same.

[141] With respect to the Catch Them Young programme and the Malaysian Ministry of Education Teacher's Portal Project in 2005, the same reasoning comes through. It is not in dispute that the explanation for the failure of the Catch Them Young Programme was the change in the school week in Singapore from 5 1/2 days to five days per week in August 2004. As a consequence more than an expected number of schools decided to withdraw from the programme for the years 2005–2006. Therefore only 67% of the anticipated revenue was collected. It is apparent that it was no part of D2's duty to, nor could D2 be expected to foretell or anticipate such a reduction in either the number of school days or its effect on the programme. D2 cannot be faulted for the failure of the programme.

[142] And similarly with the Teacher's Portal Project in 2005, D2 could not possibly be expected to foretell that the Malaysian Ministry of Education would decide not to renew the project in 2005. More significantly that is not the scope of D2's duty. In other words it is no part of D2's scope of work and thereby duty to assess the achievability of the Teacher's Portal Project in 2005. It follows that as there is no duty of care owed by D2 to readers of the prospectus or prospective purchasers to assess or guarantee the achievability of the projects set out in the specific assumptions forming the basis for the profit forecast. As no such duty subsists, there can be no breach. The losses suffered by the plaintiffs ought not, therefore, to be attributed to D2.

Whether D1 as Litespeed's listing advisor and placement agent was negligent and/or in breach of its statutory duty in permitting the inclusion of the positive financial forecast for 2006 in the prospectus, which inclusion gave rise to a negligent misstatement namely that Litespeed was a good investment prospect, when as a matter of fact. D1 knew or ought to have known that the factual premise/consideration on which the forecast was based had altered or deteriorated materiallv as a conseguence of which the forecast was inaccurate and/or misleading. This caused the plaintiffs to suffer loss

[143] D1 plays an even lesser role in relation to the profit forecast for 2006 than the reporting accountants, whom I have determined above are absolved of any issue of negligent misstatement or misrepresentation or omission.

[144] As stated before and borne out by the verification notes the scope of D1's duty was to verify the issue price, details of the public issue, brokerage, underwriting and placement fees, restructuring and listing exercise, and the procedure for application and acceptance.

THE PLAINTIFFS' GRIEVANCE

[145] However the plaintiffs' grievance is that the financial information that D1 had relied on was to be procured only from the accounts for the period ending 30 April 2005, with no provision for any update on the status of Litespeed or the group between that date, ie 30 April 2005 and the date of the prospectus, ie 27 October 2005.

[146] The plaintiffs' point to the fact that Litespeed's unaudited financial results for the first quarter of the financial year 2005–2006, ie the quarter ending 31 July 2005, recorded a loss of RM1.907m. They question why D1 (and D2) failed to inquire or ascertain Litespeed's performance after 30 April 2005 and prior to the issuance of the prospectus as this would have accorded a more up to date or accurate picture of the group's financial performance, which in turn would enable prospective investors to determine more accurately whether or not to invest in Litespeed.

[147] However as discussed earlier, the evidence discloses that D1 only became aware of these first quarter results in November 2005, after the listing of the Litespeed shares. I have also considered the issue of whether D1 owed a duty to the prospective purchasers to make inquiries about the period subsequent to 30 April 2005 and concluded otherwise based primarily on the scope of works undertaken by them.

[148] Moving on to the profit forecast, the plaintiffs say that while D1 was not prepared to make enquiries about the current financial status of the company after 30 April 2005, it was nonetheless prepared to issue a profit forecast for the following year, 2006. Given that such a profit forecast is not mandatory it is contended that this is clear evidence of a misstatement by D1 which was made with a view to inducing prospective purchasers to invest.

D1'S RESPONSE

[149] The profit forecasts were premised, as has been stated repeatedly, on the information given by the directors and in respect of which D1 has no liability. Moreover as has been highlighted previously the prospectus itself states that the directors accept full responsibility for the forecast.

[150] Further, the financial forecast was based on calculations (which were reviewed by D2) and the specific assumptions which were made by the directors. Only D2 provided a limited opinion as has been considered at length above. D1 was not involved in assessing or commenting on the financial forecast. As such it does not appear that the accuracy or otherwise of the financial forecast can be attributed as a responsibility of D1. In other words, D1's duty of care in relation to its duties pertaining to the contents of the prospectus does not extend to an assurance that the profit forecast is certain or accurate.

[151] On the contrary the evidence at trial disclosed clearly that throughout the prospectus numerous cautionary warnings were sounded to prospective investors. This is particularly so given MESDAQ which is known to be a volatile market with considerable risk. In so far as the financial forecast was concerned, as stated above, only D2 provided a limited opinion relating to the calculation and assessment method in relation to whether the financial information provided in the prospectus complied with Malaysian accounting standards. D1 was not directly involved. However even if it is considered that D1 had an overriding duty to ensure that the information in the prospectus was not misleading this obligation was met because the accuracy or otherwise of the financial forecast is not the responsibility of D1.

[152] The various cautionary statements issued have to be accorded due recognition, (see *Peekay Intermark Ltd & Anor v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511 at p 512 which was adopted by the Singapore Court of Appeal in *Orient Centre Investments and another v Societe Generale* [2007] 3 SLR 566 at pp 568 and 586). In *Peekay*'s case, the English Court of Appeal held that by signing the form acknowledging the investment risks and returning it to the bank, the plaintiff was aware of the nature of the investment. Accordingly the plaintiff could not assert that it was

induced to inter into the contract by the defendant bank. In the instant case in like manner, the second to fourth plaintiffs, by accepting and signing the acceptance forms for the private placement shares, duly acknowledged that they were purchasing the same without reliance on any representations of D1.

[153] In *Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors* [2008] 2 MLJ 256 the Court of Appeal held that 'to deny the legitimacy and effectiveness of an exclusion clause for which it was designed, would render it meaningless. The exclusion clause was clear and the words used were easily definable, with no absurdity, inconsistency or repugnancy when arriving at a straightforward interpretation'.

[154] The plaintiffs' did establish through DW1 that the inclusion of a financial forecast was not mandatory. However DW1 explained that the financial forecast was included as the directors had determined that for purposes of transparency it was preferable to include the profit forecast. In the absence of a profit forecast, Litespeed would have had to provide a reason as to why no profit forecast was being disclosed. D1 cannot be faulted for permitting or agreeing to the inclusion of the profit forecast. This is particularly so given the clear limiting and warning clauses which preceded and were set out subsequent to the forecast.

THE SPECIFIC ASSUMPTIONS

[155] I have considered each of the specific assumptions underlying the financial forecast in some detail in relation to D2. There is no necessity for a repetition of those facts again here. Suffice to say that there is no evidence or basis to warrant a finding or inference that:

(a) D1 was responsible for the veracity of the factual premises underlying the financial projections for 2006. This was primarily the responsibility of the directors of Litespeed. In any event D2 was available to give a limited opinion to ensure that prospective purchasers who read the prospectus would know that the calculations were in order and that the forecast had been premised on the utilisation of financial information which was in conformity with Malaysian accounting standards. However neither D1 nor D2 could be responsible for the Specific Assumptions and to that extent they took pains to set out at several places in the prospectus that there was a real possibility of significant deviation in the forecast;

(b) specifically in respect of the First iRead contract and its defaulting in the repayment of scheduled payments, this information was not made known to D1. Being financial information in any event the primary responsibility for the same lay with D2 to the limited extent of its role.

Therefore it cannot be concluded that D1 had a duty to enquire or ascertain the status of repayment under that contract; and

(c) neither can D1 be faulted for the failure of the group to secure or procure the E-learning contract targets it had set for itself as a target and which comprised the basis for the financial forecast. DW1 explained that at the time of the inclusion of the forecast, the directors were in fact bidding for more contracts than that disclosed in the forecast, there was no issue with including the proposed forecast.

THE AGM OF 31 OCTOBER 2006

[156] At Litespeed's Annual General Meeting held on 31 October 2006 the agenda included a resolution for the audited accounts for the year ending 30 April 2006 to be passed. An explanation was provided for the deviation in the profit forecast. None of the shareholders including the second to fourth plaintiffs queried or complained about the losses incurred then. Accordingly the audited accounts were unanimously approved. If indeed the second to fourth plaintiffs had been misled by the prospectus as now comprises the substratum of their case, then grievances or protests ought to have been made clear at that stage.

[157] Ultimately it appears to this court that D1 owed no duty to any prospective purchaser to assure them that the profit forecast was accurate or that a profit within that range could be anticipated. On the contrary, prospective purchasers were warned about the uncertainty and variation of the specific assumptions which would result in deviation. Prospective purchasers were also cautioned about the volatility of the market and advised to procure independent advice. Certainly no assurance or guarantees were set forth in the prospectus or information memorandum. It is pertinent that in the instant case the deviation arose not as a consequence of erroneous or inaccurate information put forward by D1 and D2 but because of the uncertainty of the factors relied upon to derive the forecast, a matter which fell squarely within the purview of the directors. D1 and D2 advised prospective purchasers of the risks involved sufficiently.

THE PLAINTIFFS' PLEADED CASE

[158] Learned counsel for D1 points to a marked deviation in the case pleaded by the plaintiffs and the case subsequently led at trial. Paragraph 14 of the statement of claim reads as follows:

A Acting on the faith of the representations and/or inducements, the 2nd, 3rd and 4th Plaintiffs made substantial investments in the said Company for themselves as well as for the benefit of Dato' Ariff

[159] In response D1 stated at paras 12–13 of its defence:

B

With regard to paragraph 14 of the Statement of Claim, the 2nd to 4th Plaintiffs, on their volition and in accepting the terms and conditions as set out in the 1st Defendant's letters of 11 November 2005, made their respective Letters of Offer all dated 14 November 2005 at their own discretion to purchase the shares of
C Litespeed. The 1st Defendant shall refer to the terms of the said letters of 11 November 2005 to show that the 2nd to 4th Plaintiffs decision to subscribe for the shares were made independently and without reliance on any representation by the 1st Defendant or its agents. The offer to purchase was accepted on 14 November 2005 and the shares were listed on 24 November 2005.

D 13. The 1st Defendant denies the 2nd to 4th Plaintiffs were nominees of the 1st Plaintiff. It was expressly affirmed in the Application Forms for the Placement Shares signed by each of the 2nd, 3rd and 4th Plaintiffs that the Placement Shares applied for, were not being acquired as a nominee of another person or persons.

E

[160] At trial however, Dato' Ariff maintained that he purchased the Litespeed shares as a gift for the second to fourth plaintiffs and that they were not investing for him. In other words they were not nominees for him. The second to fourth plaintiffs testified and confirmed that they had accepted the subject shares as a 'gift' from Dato' Ariff.

F

[161] D1 submits that this constitutes a significant departure from the pleadings and is in effect an attempt to circumvent their initial stance that the shares had been purchased for Dato' Ariff's benefit or that they were his
G nominees.

[162] I accept that there has been some deviation from the original pleadings. I am however not able to conclude with any degree of certainty that this was in fact an attempt by the plaintiffs to 'circumvent' any earlier stance
H they had taken. It is not in fact clear from the plaintiffs' original pleading in what manner Dato' Ariff stood to benefit from the purchase of the Litespeed shares.

RELIANCE ON THE CONTENTS OF THE PROSPECTUS

I

[163] The evidence at trial disclosed that representations in the prospectus, such as they were, induced only Dato' Ariff and not the other plaintiffs. As such the elements of reliance and inducement are not established as having directly affected the second to fourth plaintiffs. The plaintiffs however contend that the

representations were made by D1 and D2 to Dato' Ariff, and that these representations were communicated by Dato' Ariff to the other plaintiffs, thus establishing liability. Ultimately the evidence shows that only D2 in fact relied on what her father, Dato' Ariff said. The third and fourth plaintiffs did not rely on anything.

[164] It appears to this court that to establish negligent misrepresentation or negligent misstatement, it is incumbent upon the complainant to establish that he relied upon that specific misrepresentation or negligent misstatement as a crucial element in the cause of action. In other words it is incumbent upon the plaintiffs to establish that the second to fourth plaintiffs relied upon the representations made by Ms Ong Hui Hui, or to have read and been induced directly by the written representations in the prospectus, in order to succeed in establishing liability under this cause of action. Here that element is absent which is another reason why I am unable to conclude that liability lies with D1 and D2.

THE FIRST PLAINTIFF'S LOCUS STANDI

[165] It is evident from a consideration of the evidence that oral representations were alleged to have been made, if at all in the manner contended, to Dato' Ariff. Dato' Ariff also read the prospectus. However it is not in dispute that Dato' Ariff himself did not subscribe for the Litespeed shares. Neither did Dato' Ariff pay for the said shares. The shares were subscribed for through a company known as Wangco. There is insufficient evidence before the court for it to conclude that Dato' Ariff controlled Wangco or to lift the corporate veil and attribute that payment to Dato' Ariff as he sought to contend at trial.

[166] Finally in the letters of acceptance, the second to fourth plaintiffs acknowledged or accepted the stipulation that they were purchasing the shares for themselves and not as nominees for any other party.

[167] Given these factors it is difficult to ascertain the basis for Dato' Ariff's claim as a plaintiff in this suit. None of the essential elements of the causes of action are relevant to Dato' Ariff as he was not an investor nor even a prospective purchaser. Dato'Ariff as the first plaintiff who did not purchase any of the Litespeed shares is not therefore entitled to any of the relief sought as he lacks locus standi.

LIABILITY OF D1 AND D2

[168] Having considered the totality of the evidence it appears to this court that the plaintiffs have failed to establish their causes of action against both D1

and D2. In the course of their submissions, the plaintiffs relied on several cases to substantiate their claim. In *White v Jones* [1995] 2 AC 207, proposed beneficiaries under a will sued the solicitors who had been instructed to prepare a new will which would have benefitted the plaintiffs, but which the solicitors neglected to do. The testator died. In these circumstances it was held that a duty of care existed vis a vis the plaintiffs.

[169] In the instant case however I have concluded that D1 and D2's duty of care did not extend to giving guarantees about the accuracy of the financial forecast. Neither did they owe a duty of care, given their scope of duty, to disclose or comment on financial information beyond the date stipulated in the prospectus. Moreover they did not, as a matter of fact have this knowledge and choose to suppress it in an effort to mislead prospective purchasers. Their duty did not extend to ascertaining or verifying further information beyond the date for which they had contracted to undertake their work. It might have been different if salient financial information had been made known to them or they were duty bound to check information which they failed to do. In such an instance, where a clear non-disclosure or suppression was evident on the facts, or even if there was a clear error in dealing with given information, the findings might well be different. But in the instant case there was no such evidence and the instant case is therefore distinguishable on the facts.

[170] In *Electra Private Equity Partners v KPMG Peat Marwick and others* [2001] 1 BCLC 589, which related to a striking out application, a company had engaged KPMG to conduct a due diligence on a company called Cambridge, it was proposing to invest in. Cambridge's auditors were one SKC which was part of the KPMG international group. SKC concurred in Cambridge producing to Electra before the investment, Cambridge's audited accounts and SKC's unqualified report on them for the year to the end of February 1992. These accounts showed a significant profit before tax and net assets. Electra then invested in Cambridge by purchasing loan stock. Cambridge's unaudited accounts for the 15 months to the end of May 1992 showed a significant loss, mainly due to bad debts. Electra lost its entire investment. Electra sued SKC and KPMG. SKC applied to strike out Electra's claim. The English Court of Appeal held that the High Court had erred in striking out Electra's claim because the judge erred in attempting to determine the central duty of care issue on the evidence before him without regard to what other evidence might emerge when discovery had been given and the issues of fact had been tested in oral evidence and by cross-examination.

[171] That is immediately distinguishable from the instant case where a full trial has proceeded and having exhaustively examined the facts, it appears to this court that no duty of care arises in the circumstances of the this case.

[172] Further and in any event, the instant case does not attribute any error in the computation or treatment of the accounts. In other words, there is no question of inaccurate information or accounts having been put forth or assessed by D2. Here the complaint pertains to the accuracy of a financial forecast in respect of which the defendants owe no duty of care, and in respect of which no assurances were given. On the contrary, warning or cautionary notes were sounded. Exclusion clauses and disclaimers were present throughout the prospectus, such being more than sufficient to warn a prudent investor of the risks that were being undertaken by investing on a MESDAQ share counter.

[173] In *Amal Bakti Sdn Bhd v Affin Merchant Bank (M) Bhd* [2012] 5 MLJ 61 the Merchant Bank in this case undertook, as advisor, a restructuring scheme which was based on a new company acquiring a business from another company under an agreement and the new company issued shares to new investors. The bank had acted as merchant bank and adviser in a scheme to restructure a public listed company. The scheme involved the participation of another company, Milan Auto (M) Sdn Bhd which held the franchise to import and distribute Alfa Romeo vehicles in Malaysia pursuant to a sales concession agreement it had with the Italian manufacturer. The bank made public announcements and issued a prospectus stating that the listing vehicle would be injected with Milan Auto (M) Sdn Bhd's core business of marketing and distributing Alfa Romeo vehicles in Malaysia. This was to be achieved by the listing vehicle acquiring the total share capital of an entity named Milan Auto Corp Sdn Bhd ('MAC') with whom Milan Auto (M) Sdn Bhd would execute a business transfer agreement and a vehicle supply agreement.

[174] Unfortunately however the investors, who were the appellants in the case before the Court of Appeal, were unaware that the sales concession agreement between MASB and the Italian manufacturer not only expressly prohibited MASB from entering into the business transfer and vehicle supply agreements with MAC, but that the sales agreement itself had been mutually terminated by the parties. Upon the Securities Commission discovering that the agreement had been terminated, it revoked its approval of the restructuring scheme and the listing. It obtained a court order to the effect that all contracts pertaining to the sale and offer for sale of the listing vehicle shares were ab initio null and void.

[175] In these circumstances the Court of Appeal held that the merchant bank was negligent by reason of its failure to ascertain by reasonable enquiry that MAC would not possess the new core business. By reason of the prohibitory clause and the termination of the sales agreement MASB was never capable of injecting the new core business into MAC. The entire exercise was a 'non-starter' from the outset rendering the listing vehicle's shares worthless. It

was found that the bank owed a duty of care to the investors. Transactions of the nature concluded between the investors and MASB were provided for in the documents authored by the bank. The bank ought to have been aware of that the announcements and statements it authored would reach investors and be relied upon by them. It was further found that the steps taken by the bank in purported discharge of its duty of care fell far short of that expected of a licensed merchant banker. The bank could not delegate its duties under the Securities Commission Act and related legislation to third parties.

[176] Learned counsel for D1 sought to distinguish the foregoing case from the present case and I accept her reasoning on this point. In *Amal Bakti* the scheme was dependent wholly on the core business to be acquired. The Court of Appeal held that the fact of the acquisition was a material fact that the bank could very easily have verified, as the counterparty could have been contacted. This is quite different from the instant case which deals not with a fact per se, but with a profit forecast which by its very nature is not a verifiable fact.

[177] Additionally in the instant case, the effect of the numerous disclaimers and cautionary notes cannot be ignored entirely. Any prospective purchaser including the plaintiffs were sufficiently warned of the nature of the risk they were undertaking and that the profit forecast in itself was dependent upon a series of variables which D1 could not guarantee. The investors here were expressly told that there was a real and significant possibility that the forecast would vary quite considerably from the projected one, depending on the outcome of the variables. Given this clear and express disclaimer it cannot be said that D1 acted negligently or in breach of its duty of care. Any purported reliance by investors too had to be qualified by the various disclaimers set out throughout the prospectus, marked in parts in bold.

[178] In the case of *Malaysian International Merchant Bankers Bhd v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia* [2001] 1 MLJ 375, a merchant bank's representative was found to have made representations to the investor and these representations were found to be false. The representation was that the directors would guarantee payment of dividend for three years at a rate of 24%. This case too is distinguishable on the following grounds as set out by learned counsel for D1, whose reasoning I adopt:

(a) D1 made no representations in the instant case. Statements pertaining to the forecast emanated from the directors, who in turn set out the basis or assumptions on which such a forecast was made. This is not attributable to D1. In *MIMB* however the representative had twisted and made a false representation of the facts;

(b) there were no disclaimers in the *MIMB* case whereas there are numerous

disclaimers in the present case which deal specifically with the issues now comprising the subject matter of complaint of the plaintiffs; and

(c) the instant case involves MESDAQ shares which are recognised as being volatile and high-risk.

[179] And in the case of *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 WLR 641 the Court of Appeal in England reversed the decision of the High Court where the latter had found that the defendant accountants were in breach of a duty of care they owed to the plaintiffs to ensure that the accounts were accurate. In that case negotiations were taking place for the take-over of a group of companies by the plaintiff. The plaintiff asked the defendants, their accountants to prepare accounts for the group of companies which comprised the subject matter of the take-over. The defendants submitted what they termed as 'final accounts' and showed a net loss and in response to a specific question put by the plaintiff stated that the group were breaking even or doing marginally worse. The plaintiff proceeded with the take-over and discovered a number of errors in the accounts. On the plaintiffs' claim for negligence against the defendants for loss and damage suffered as a result of the take-over the judge gave judgment for the plaintiff stating, inter alia, that the defendants had misrepresented matters to the plaintiff and were in breach of a duty of care they owed to the plaintiffs in respect of the accounts and the answer. On appeal however the decision was reversed, the English Court of Appeal holding that there was not such a relationship of proximity between the plaintiffs and defendants as to establish a duty of care.

[180] In the discussion on the law relating to negligent misstatement giving rise to economic loss the English Court of Appeal in the foregoing case considered a large spectrum of cases from *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 onwards and culminating in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. Reference was made to the speech of Lord Bridge in the *Caparo* case in which he summed up the authorities in the United Kingdom in relation to this branch of the law (which differs from other Commonwealth jurisdictions):

> The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation

reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it.

[181] A restrictive approach was therefore adopted to any extension of the scope of the duty of care beyond the person directly intended by the maker of the statement to act upon it. In deciding whether a duty of care exists in any particular case it is necessary to take all the circumstances into account.

[182] Applying the foregoing to the instant case it is apparent that D1, as the merchant banker and underwriter in preparing the prospectus would have been aware that potential investors, including the plaintiffs would rely on the information in the prospectus in determining whether or not to make an investment. However it is clear from the foregoing passage that effect has to be given to any disclaimer of responsibility. A perusal of the prospectus in this case makes it clear that:

(a) the nature of the information in the prospectus was clearly described such that its limitations were made very clear. For example it was evident that matters pertaining to the profit forecast emanated from the directors and not from D1 (or D2) directly. Secondly it was made clear that the forecast was premised on assumptions the certainty of which could not be guaranteed. Therefore the information comprising the crux of the complaint in this matter was not of a factual nature which was well within the knowledge of D1. Instead, it was a prospective assumption, which by its very nature is speculative and does not fall within the purview of factual information nor advice. A duty of care cannot exist in respect of such information which in itself is uncertain or incapable of being ascertained accurately;

(b) there was numerous disclaimers of responsibility and cautions sounded to prospective investors to procure independent advice before undertaking investment; and

(c) in the instant case the element of 'reliance' on the prospectus has not been made out as the plaintiffs who invested in the subject shares did not read the prospectus. They merely relied on advice given by Dato' Ariff, who in turn maintains that he relied on the prospectus, more particularly the profit forecast. This is insufficient, to my mind, to amount to reliance on actual representations made in the prospectus, thereby inducing the remaining plaintiffs to invest in these shares.

[183] For these reasons, it appears to this court that the plaintiffs have not succeeded in establishing that D1 was negligent in including the positive financial forecast for 2006 in the prospectus, thereby giving rise to a negligent misstatement. I find as a matter of fact that D1 did not know that the factual

premise on which the forecast was based had altered or deteriorated at the time when it was issued on 27 October 2005. As such D1 cannot be said to have issued a statement which it knew was inaccurate and misleading. Further D1 owed no duty to ascertain or make further enquiries about the validity of the profit forecast as of 27 October 2005, as it was entitled to rely on the information given to it by the directors at the material time. Moreover the fact that they had provided numerous disclaimers which had the effect of sufficiently warning potential investors to make their own independent inquiries prior to investment, clearly had the effect of tempering any possible representation made by the forecast, which in any event, emanated from the directors.

LOSS AND DAMAGE

[184] For purposes of completion I consider this issue, although it is evident from my foregoing conclusions that, as no liability accrues to D1 and D2 in respect of negligent misstatement or misrepresentation, the issue of damages flowing from such alleged negligence, does not arise.

[185] The plaintiff submits that the appropriate measure of damages to be imposed against the defendants is as set out in the New Zealand case of *Scott Group v McFarlane* [1978] 1 NZLR 553 at p 585. That case concerned the takeover of a company at a value based on the accountant's report which was erroneous as certain assets had been overstated. The plaintiff then sought damages the measure of which was the difference between the amount by which the investor was out of pocket and the value of the investment.

[186] In relying on this formula, the court in *Scott*'s case drew a parallel with an action in tort for deceit leading to a contract of purchase. In such a case, it was said, the normal measure of damages is the difference between the price paid and the fair value at the time of purchase: *Canavan v Wright* [1957] NZLR 790; *McGregor on Damages* (13th Ed), Chapter 39.

[187] Applying the foregoing formula to the instant case, the plaintiffs here submit that the reported earnings per shares for Litespeed for the year ended 30 April 2005 was 11.93 sen per share. The profit forecast represented that the earnings per share would be 5.4 sen. However for the quarter ended 31 October 2005, the loss per share was 2.93 sen and 5.31 sen for the year to date.

[188] Given the extent of the plaintiffs' collective investment, the aforesaid loss completely extinguishes the quantum paid to subscribe for the shares in the

first place. The plaintiffs therefore claim the entirety of the monies paid by way of subscription for their investment in Litespeed, namely the sum of RM6,909,940.

[189] The defendants dispute this contention:

(a) they point out that the plaintiff is bound to prove its loss and damage and cannot throw the matter to the court for the court to decide. In this context they state that as the plaintiffs are still shareholders of Litespeed their claim for such damages is untenable as they are still holding on to those shares. They have not sold their shares. As such they cannot claim that they have suffered losses. They have not proven the loss they allegedly suffered;

(b) payment for the shares was not made by the plaintiffs but by a company known as Wangco which Dato' Arfff claims to own. As such the defendants maintain that the plaintiffs have not shown that they have themselves suffered loss in terms of monies paid out for the subscription of the subject Litespeed shares; and

(c) they also point to the fact that the value of the Litespeed shares at the time when the claim was filed, was adversely affected by the plaintiffs' own actions in filing a winding up petition on 11 June 2007 vide Kuala Lumpur High Court Petition No D1–28–384 of 2007. The same complaints as arose in the current suit were the subject matter of the petition. This is not in dispute. With the presentation of the petition it was difficult for Litespeed to continue business or procure new contracts as its financial operations were adversely affected. D1 contends that the filing of this petition constituted a novus actus interveniens, which in any event broke the chain of causation thereby precluding the plaintiffs from recovering the sum sought (even if they managed to establish liability).

[190] Subsequently on 19 March 2009, the petition was withdrawn with no liberty to file afresh. It was withdrawn for a settlement sum of RM400,000. The plaintiffs maintain that this sum represented legal costs, while the defendants maintain that the said sum represented a full and final settlement of all issues raised in the petition, which were identical to those matters raised here.

[191] Having considered the entirety of the submissions it appears to this court that:

(a) the plaintiffs are not entitled to any loss or damages as claimed as they have not established their case against both the defendants;

(b) if liability had indeed been established, the normal measure of damages as set out in *Scott v McFarlane* relying on the measure of damages in the tort

of deceit, namely the difference between the actual price paid for the shares and a fair assessment of their value at the material time might have been available;

(c) however in the instant case the plaintiffs failed to establish that the second to fourth plaintiffs actually suffered such loss as it is not evident in the first place that they had paid for those shares. It is also not clear on the evidence, apart from a bare statement to that effect that Dato' Ariff paid for the shares. The evidence discloses that the monies emanated from Wangco and there is insufficient evidence before the court for it to conclude that Wangco is synonymous with Dato' Ariff such that the corporate veil should be lifted; and

(d) the filing of the winding up petition is relevant as it appears that identical matters were raised and then dealt with as settled with an exchange of a not insignificant sum of money. Issue estoppel arises to preclude the plaintiffs from relitigating the same issues, and more significantly making claim under the same causes of action, having received monies in settlement of the petition. It is not unreasonable to assume that the settlement related to the matters raised in the petition which are raised again here. While the plaintiffs maintain that the said sum was purely for costs, this does not resolve the issue completely. This again throws doubt on the basis and quantum of the plaintiffs' claim.

[192] For the foregoing reasons it appears to this court that the plaintiffs' claim fails. It therefore stands dismissed with the costs of this action to be borne by the plaintiffs. The quantum of costs to be awarded will be determined by this court after hearing arguments.

Claim dismissed with costs.

Reported by Ibnu Aswan